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No. ....

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ELIAS MARSTERS and E. F. LAKIN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

**Filed**

SEP 20 1915

**F. D. Monckton,**  
Clerk.

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Upon Appeal from the United States District Court for the  
District of Idaho, Southern Division.

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No. ....

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(Names and Addresses of Attorneys.)

---

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E. F. Lakin.*

J. L. McCLEAR,

United States Attorney, Boise, Idaho;

B. E. STOUTEMYER,

United States Reclamation Service,  
Boise, Idaho;

*Attorneys for United States of America.*



*In the District Court of the United States, in and  
for the District of Idaho, Southern Division.*

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.....TERM, A. D. 1915.

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IN EQUITY.

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UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

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BILL OF COMPLAINT.

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Complainant alleges:

I.

That this action is brought by C. H. Lingenfelter, United States Attorney for the District of Idaho, by authority of the Attorney General of the United States pursuant to application therefor made by the Secretary of the Interior.

II.

That on December 4, 1903, C. W. Moore, John Plowhead, Peter Sonna, J. H. Lowell, Frank Steunenberg, H. A. Partridge, E. M. Kirkpatrick, Edward K. Hayes, Edward Allen and W. A. Coughanour, all citizens and residents of the State of Idaho, filed with the State Engineer of Idaho an applica-



tion for permit to appropriate and divert 5,200 cubic feet per second of the waters of Boise River for the irrigation of the lands in Ada and Canyon Counties, Idaho, now known as the Government Boise Project, and for the purpose of the construction of said project by the Secretary of the Interior of the United States under the Act of Congress of June 17, 1902 (32 Stat. L. 388), known as the Reclamation Act.

### III.

That thereafter, on January 19, 1904, the State Engineer of Idaho approved said application and granted said permit and numbered said permit Permit No. 430.

### IV.

That thereafter, on the 24th day of February, 1904, the said above named parties who filed said application for permit and to whom said permit was granted, assigned the said permit to the Honorable E. A. Hitchcock, Secretary of the Interior of the United States, for the purpose of the construction of said irrigation project under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), known as the Reclamation Act.

### V.

That the Secretary of the Interior caused surveys and investigations to be made for said project and found the same to be practicable and feasible and thereafter let contracts for the construction thereof under the provisions of the said Act of Congress of June 17, 1902.

VI.

That within the time named in said permit for the completion of works, the diversion works, canals and laterals for the purpose of conveying water to the point of intended use, had been constructed and completed to a capacity of 1647 second-feet, and the United States, acting through the Secretary of the Interior, made due proof of the completion of said works to said capacity of 1647 second-feet and the State Engineer of Idaho examined said proof and works constructed under said permit and accepted said proof and issued to the United States under said permit a certificate of completion of works to a capacity of 1647 second-feet.

VII.

That the United States has also made and perfected other filings and appropriations upon the waters of Boise River of later date than the one above described, and has constructed works of an additional capacity for the diversion thereof.

VIII.

That the said 1647 second-feet is the first Government appropriation from Boise River and is under date of priority of December 4, 1903.

IX.

That the said 1647 second-feet has been actually diverted through the said irrigation works of the Government Boise Project and applied to beneficial use in the irrigation of the lands included in said project.



## X.

That in the year 1906 a certain decree was entered in the District Court for the Third Judicial District of the State of Idaho, in the case of Farmers' Co-operative Ditch Co. vs. Riverside Irrigation District, et al., commonly known as the Stewart Decree, in which Decree the duty of water from the Boise River was decreed by the District Court to be one miners' inch per acre on bench lands and 1.1 miners' inches on bottom lands, and certain amounts of water awarded and decreed to various canal companies and individuals, diverting water from Boise River, said amounts being determined on the basis of one miners' inch per acre on bench lands and 1.1 miners' inches per acre on bottom lands.

## XI.

That the Complainant, the United States of America, was not a party to said suit, nor served with process, nor were its rights adjudicated in said Decree, and said Decree did not purport to determine the rights of the United States, nor the rights of any of the parties thereto as against the United States.

## XII.

That an appeal was taken from said decision and Decree in the District Court to the Supreme Court of the State of Idaho and that the Supreme Court found that said Decree of the District Court fixing one miners' inch per acre and 1.1 miners' inches per acre as the duty of water from Boise River, was not supported by the evidence, and that one miners' inch per acre of water was more than was necessary for the

irrigation of the lands using water from Boise River, and reversed the decision of the lower court on the question of the duty of water, which included the amount decreed to the several canals, and vacated the order of the District Court and sent said case back to the District Court for rehearing as to the duty of water.

XIII.

That each year since said decision of the Supreme Court and for four years past, the District Court has each year made a temporary order or decree for that year, establishing for each year a higher duty of water than that provided in the Decree of the District Court of 1906, and establishing six-tenths (6-10ths) of a miners' inch per acre as the duty of water for the season in question.

XIV.

That said amount of six-tenths (6-10ths) of a miners' inch per acre has been found by actual use and experience, during the period of four years, to be sufficient for the irrigation of lands entitled to receive water from Boise River.

XV.

That the temporary order issued for the season of 1912 was for the season of 1912 only, and expired under its own terms at the end of the irrigation season of 1912.

XVI.

That the order and decree entered by the District Court in 1906 is not now in effect because it has been



vacated by the Supreme Court as to the duty of water and as to the amount awarded to the several canals.

#### XVII.

That up to the present time no order or decree of any kind has been issued by the court for the distribution of water during the season of 1913 and no party has yet presented to the court any application for an order of the court distributing the waters of Boise River for the season of 1913.

#### XVIII.

That the amount of the rights of the several appropriators from Boise River is not now decreed by the court and no order has been issued for the distribution thereof.

#### XIX.

That Elias Marsters and E. F. Lakin, assuming to act as Water Commissioner and Watermaster respectively, but without authority of any Decree of the court or order of the court, have gone upon the Government diversion works and threatened to interfere with the Government headgates and to break or unlock the locks of the Government headgates and shut down the Government headgates and to put into effect the said Decree of the District Court of 1906, and to deliver to certain canals, water in excess of one miners' inch per acre and to shut the water out of the Government canal in violation of the decision of the Supreme Court and without authority of any order or decree of court and in violation of the rights of the United States.

## XX.

That there is an abundance of water flowing in Boise River to supply all appropriations upon the basis of six-tenths (6-10ths) of a miners' inch per acre or any other reasonable or proper duty of water but there is not sufficient water flowing in the Boise River to supply the needs of the water users from Boise River if an amount equal to or in excess of one miners' inch per acre is allowed as the duty of water.

## XXI.

That the said Government Boise Project includes approximately 240,000 acres of land, all of which in its natural state is arid and unproductive, and requires irrigation to produce agricultural crops thereon.

## XXII.

That of this amount about 80,000 acres has a partial water supply from other sources prior to the construction of the Government irrigation works, and is under contract to the Government for a supplemental supply of water from the Government works and about 160,000 acres was entirely without water supply until the construction of the Government irrigation works, and has no other source of water supply whatever except from the Government works.

## XXIII.

That upon this 160,000 acres about 2,000 homestead entrymen and land owners have settled with their families and have cleared the land and put it



into cultivation and are growing crops thereon, which crops will be ruined and destroyed if they are deprived of the water with which to irrigate the same, and that said settlers and entrymen are also dependent upon the water supply from the Government canal for necessary water for domestic purposes and for the purpose of watering their stock.

#### XXIV.

That six-tenths (6-10ths) of a miners' inch of water per acre is a reasonable and proper duty of water and that one miners' inch per acre is an excessive and wasteful duty of water and would result in much land being entirely deprived of water and the entire loss and destruction of crops on thousands of acres of land which would be saved under any reasonable or proper duty of water.

#### XXV.

That great and irreparable injury will be done to said entrymen and to the United States if the said water supply is shut off.

#### XXVI.

That the Complainant will be damaged in the amount of Ten Thousand (\$10,000) Dollars per day for each and every day that the water is shut out of said Government canal wrongfully and illegally as threatened by said Defendants.

*Wherefore*, the Complainant prays that the Defendants, their agents, subordinates and employees, and all persons acting under them, be enjoined and restrained from interfering with said Government

headgates without an order of the court authorizing them to do so, and have damages in the sum of Ten Thousand (\$10,000) Dollars per day for each and every day that the water is shut out of said canal wrongfully and illegally as threatened and attempted by said Defendants, and that Defendants be enjoined from distributing said water of Boise River upon the basis of the said duty of water of one miners' inch and one and one-tenth (1.1) miners' inches per acre, which has been reversed and set aside by the Supreme Court of the State.

C. H. LINGENFELTER,  
United States Attorney for the District of Idaho.

B. E. STOUTEMYER,  
Residence: Boise, Idaho.

State of Idaho,  
County of Ada,—ss.

George H. Bliss, being first duly sworn, on oath deposes and says:

That he is Project Manager of the United States Reclamation Service, employed on the Boise Project of the United States referred to in the above entitled cause of action, and makes this verification in its behalf.

That he has read the foregoing Bill of Complaint, knows the contents thereof, and believes the facts therein stated to be true.

GEORGE H. BLISS,  
Project Manager U. S. R. S., Boise Project.



Subscribed and sworn to before me this 12th day of July, 1913.

(Seal)

A. E. EBY,  
Notary Public.

My commission expires February 27, 1917.

Endorsed: Filed July 12, 1913. A. L. Richardson, Clerk.

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*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,

vs.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

### NOTICE TO SHOW CAUSE.

*To Elias Marsters and E. F. Lakin, above named Defendants:*

You and each of you are hereby notified that there is a complaint on file in the above entitled cause, alleging, among other things, that the United States has constructed certain diversion works, canals and laterals to a capacity of sixteen hundred forty-seven (1647) second feet from the Boise River, and has made due proof of the completion of said works, and the State Engineer of Idaho examined said proof under said permit, and accepted said proof and issued to the United States a certificate of completion of works to a capacity of 1647 second feet; that the United States has also made and perfected other

filings and appropriations upon the waters of Boise River; that the said 1647 second feet has been actually diverted through the said irrigation works of the Government Boise Project, and applied to beneficial use; that said defendants, assuming to act as Water Commissioner and Watermaster, respectively, but without authority of any decree of the court or order of the court, have gone upon the Government Diversion Works and threatened to interfere with the Government headgates, and to break or unlock the locks of the Government headgates and to shut the water out of the Government's canal in violation of the rights of the United States; that the said Government Project includes approximately two hundred forty thousand (240,000) acres of land which requires irrigation to produce agricultural crops thereon, and praying that defendants and all persons acting under them be restrained and enjoined from interfering with said Government headgates without order of the court authorizing them to do so, and for damages in the sum of Ten Thousand Dollars (\$10,000.00) per day for each and every day that the water is shut out of said canal wrongfully and illegally as threatened and attempted by said defendants.

You are further notified to appear on the 17th day of July, 1913, at 10:00 o'clock a. m., at the Federal Court Room in Boise, Idaho, and show cause why temporary restraining order pendente lite should not be granted restraining yourselves and all persons



acting under you from interfering with said head-gates without an order of the court authorizing you so to do.

A copy of the complaint, together with the affidavit of George H. Bliss, is hereto attached and made a part of this notice.

C. H. LINGENFELTER,  
United States Attorney for the District of Idaho.  
B. E. STOUTEMYER,  
Residence: Boise, Idaho.

Endorsed: Filed July 12, 1913.

---

*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

### MOTION TO DISMISS.

Now come the defendants, and move the court to dismiss the Bill of Complaint herein for the following reasons, to-wit:

#### I.

That said bill of complaint fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein.

#### II.

That said bill of complaint shows upon its face that

this court is without jurisdiction of the subject matter of this action.

J. H. PETERSON,  
J. J. GUHEEN,  
T. C. COFFIN,  
Solicitors for the Defendants.

Service of the foregoing motion to dismiss admitted this 1st day of August, 1913.

C. H. LINGENFELTER,  
United States Attorney.

By Maude L. Bay.

Endorsed: Filed Aug. 1, 1913. A. L. Richardson, Clerk.

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*In the United States District Court for the District  
of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
VS.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

October 11, 1913.

MEMORANDUM DECISION ON DEMURRER.

C. H. LINGENFELTER, Esq.,  
B. E. STOUTEMYER, Esq.,  
Attorneys for Complainant.

J. H. PETERSON, Esq.,  
J. J. GUHEEN, Esq.,  
T. C. COFFIN, Esq.,  
Attorneys for Defendants.

DEITRICH, District Judge.



As stated orally from the bench at the conclusion of the argument, the status of the United States in this suit is precisely that of a private individual or corporation. As a suitor it has the rights, no greater and no less, of the owner of an irrigation canal. It is entitled to the same protection as any other water user and is subject to the same limitations and conditions.

As further explained at that time, it cannot be held that there is any decree adjudicating the water rights on the Boise River. By reason of the reversal or modification by the Supreme Court of the decree originally entered in the suit referred to it is ineffective for any purpose. The prime requisites of any decree in a water right suit are both the date and the amount of the appropriation. As the decree in the case referred to now stands it only fixes the date of the appropriations.

There was left but one question for consideration, namely, whether or not a Water Commissioner, appointed and acting under the irrigation law, has the power and authority through a watermaster appointed by him, or otherwise, to control the diversion gates upon a stream the rights in which have not been adjudicated or otherwise definitely determined. In a brief now presented by counsel for the defendants, emphasis is placed upon certain expressions and passages in the irrigation act (Idaho Revised Codes, Section 3240, et seq.) which have a tendency to support the view that a Commissioner has such power, but upon an analysis of the entire act I am unable to

avoid the conclusion that the Legislature did not intend to confer such unlimited authority. It is true that in Section 3270 it is provided that: "The Commissioner of each water division shall have immediate direction and control of the acts of the watermasters and the distribution of water from all the streams to the canals diverting therefrom in his division, etc.," but this provision must be read in connection with other provisions of the law. It may very well be that the Commissioner has a measure of supervisory authority over all watermasters, but it does not follow that he has the power to appoint watermasters in all cases or that he has the authority to interfere with canals or regulate the distribution of water, in cases where he is without power to appoint a watermaster to perform such duties.

Upon an examination of Section 3274 it will appear that the Commissioner has no authority to appoint a watermaster to distribute waters of a stream the rights in which have not been adjudicated, and it will also appear, I think, that it was not intended that the Commissioner should exercise anything more than a supervisory jurisdiction in such cases. Section 3274 directs the Board of Irrigation to divide the state into water districts, and it provides that: "The water districts which shall be first created are those which will embrace the streams whose rights have already been allotted by the District Court, the distribution of which shall, by the provisions of this chapter, be under the control of the Water Commissioners for the divisions in which such stream or



streams are situated. Other districts shall be created from time to time as the appropriations and priorities thereof from the streams of this state shall be confirmed or adjudicated." There is no intimation here of authority in the Board of Irrigation to create districts except in cases where the water rights have been adjudicated.

It is further provided in this section that when irrigation works are owned by a company or association of water users the Water Commissioner may, upon petition of such company or association, appoint a water master to take charge of the water from such works, but in such cases the Water Commissioner can act only upon petition of the company or association. There is another provision in this section by virtue of which, in certain cases, even of adjudicated water rights, the water master is not appointed by the Water Commissioner, but he is elected by the water users.

Section 3275 purports generally to confer authority upon the Water Commissioner to appoint a water master for any water district created under the provisions of the chapter in which the section is contained, but this general provision is of course to be read subject to the limitations and specific exceptions embraced in other parts of the chapter; for instance, the exception just referred to embraced in the next preceding section. And in this very section, viz., 3275, it is expressly provided "that any vicinity or neighborhood, the inhabitants of which use the waters of any ditch or stream the rights in which have

not been allotted, shall constitute a water district," and that not the Water Commissioner but the water users have the right to select a water master. Detailed provision is made for the time of holding a meeting and the manner in which it shall be called, for the election of such water master, and for his qualifications. While such water master so elected is in a sense subject to the supervision of the Water Commissioner, his duties are prescribed by law, and the scope of his authority is defined, and the Water Commissioner cannot relieve him of any of such duties or enlarge the statutory scope of his authority. He is to distribute the water to those who are entitled thereto, and he cannot "interfere with the vested rights of individuals, companies or corporations, or in any manner interfere with the rights of individuals, companies or corporations to the use and control of water the right to the use of which is or may be their private property."

It follows from these considerations that, to say the least, no presumption arises from the mere allegation in the complaint "that Elias Marsters and E. F. Lakin, assuming to act as Water Commissioner and water master, respectively, but without any authority of any decree of the Court or order of the Court," interfered with and injured the plaintiff's headgate and canal, that in so doing they were acting within the scope of their official authority or were in the rightful exercise of their official discretion. That being the case, the complaint upon its face exhibits facts sufficient to entitle the plaintiff



to equitable relief and the cause of action is within the jurisdiction of this court. The motion to dismiss will therefore be denied, and the defendants will be given ten days from the date hereof in which to answer.

FRANK S. DIETRICH,  
District Judge.

Endorsed: Filed Oct. 11, 1913. A. L. Richardson, Clerk.

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*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

AFFIDAVIT.

George H. Bliss, being first duly sworn, deposes and says that following the threats made by the Defendants herein as alleged in the Bill of Complaint, said Defendants, Elias Marsters and E. F. Lakin, and certain other persons whose names are to the affiant unknown, acting under the direction of said Elias Marsters, went upon the Government property and withdrawn lands of the United States and the Government Diversion Dam and headgates of the Government Canal on the Boise Project, and broke the lock on said headgates and interfered with said headgates and turned out of said Government Canal all of the water included in the Government's water

appropriation as described in the Bill of Complaint, although there was at that time in the Boise River and is still in the Boise River, enough water, if distributed as decreed in the temporary orders of previous years, or any reasonable or proper duty of water, to supply to all users of water from Boise River sufficient water for the irrigation of all crops growing in the Boise Valley.

That by said acts of the Defendants, several thousand settlers and farmers under the Government irrigation system are deprived of water and their crops being destroyed, although there is now sufficient water in the river, if distributed in any reasonable or lawful way, to supply water to all water users and serve all crops now growing in the Boise Valley, and that said parties threaten to and will continue said unlawful trespass and interference with said Government headgates and canal system and other property unless restrained by an order of the court.

GEORGE H. BLISS.

Subscribed and sworn to before me this 12th day of July, 1913.

(Seal)

A. E. EBY,  
Notary Public.

My commission expires Feby. 27, 1917.

Endorsed: Filed July 12, 1913. A. L. Richardson, Clerk.



*In the District Court of the United States, in and  
for the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.

ELIAS MARSTERS and E. F. LAKIN, Defendants.  
PETITION FOR LEAVE OF COURT TO FILE  
SUPPLEMENTAL BILL OF COMPLAINT.

The Complainant hereby petitions your Honorable Court for permission of the court to file in the above entitled cause a Supplemental Bill of Complaint setting out certain material facts and certain acts of the Defendants which have occurred and been performed since the filing of the original Complaint herein, a copy of which Supplemental Bill of Complaint is hereto attached and made a part of this Petition; that the reason for the filing of said Supplemental Bill of Complaint is that subsequent to the acts complained of in the original Bill of Complaint and the filing of said original Bill of Complaint, the Defendants committed certain trespasses upon the property of the United States and did certain acts and things to the damage of the United States, the nature, extent and duration of which was not and could not be known at the time of the filing of the original Bill of Complaint, and that said acts are more particularly described and set forth in the attached Supplemental Bill of Complaint, for the filing of which permission of the court is asked.

C. H. LINGENFELTER,

United States Attorney, District of Idaho.

Endorsed: Filed November 1, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the respective parties hereto that the defendants be given to and including Monday, October 27, 1913, in which to prepare and file their answer in the above entitled action.

C. H. LINGENFELTER,

Attorney for Plaintiff.

J. H. PETERSON,

Attorney for Defendants.

Endorsed: Filed Oct. 20, 1913. A. L. Richardson, Clerk.

---

*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the respective parties hereto that the defendants be



given until Wednesday, November 5, 1913, in which to prepare and file their answer in the above entitled action.

C. H. LINGENFELTER,  
Attorney for Plaintiff.

J. H. PETERSON,  
Attorney for Defendants.

Endorsed: Filed Oct. 25, 1913. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

### STIPULATION.

It is hereby stipulated and agreed by and between the respective parties hereto that the defendants shall have until December 1, 1913, in which to prepare and file their answer in the above entitled action.

B. E. STOUTEMYER,  
Attorney for Complainant.

J. H. PETERSON,  
Attorney for Defendants.

Endorsed: Filed Nov. 21, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

ANSWER.

These defendants, reserving all manner of exceptions that may be had to the many uncertainties and imperfections of the bill, come and answer thereto, or to so much thereof as they are advised is material to be answered to, and say:

I.

Admit the allegations contained in paragraphs I, II, III and IV of the Bill of Complaint.

II.

Answering paragraph V of said Bill of Complaint, these defendants have not sufficient knowledge, information or belief to enable them to answer as to whether the Secretary of the Interior caused surveys and investigations to be made for said project and found the same to be practicable and feasible, and thereafter let contracts for the construction thereof, under the provisions of said Act of Congress of June 17, 1902, but demand strict proof thereof.

III.

Defendants, and each of them, deny that within the time named in said Permit No. 430 for the completion of works, or at any other time, the diversion



works, canals, or laterals, or any works, canals, or laterals, for the purpose of conveying water to the point of intended use, have been constructed, or completed to a capacity of 1647 second feet, or to a capacity of any other number of second feet, or that the United States, acting through the Secretary of the Interior, or that the United States, acting through any other official of the United States of America, in any manner at all, made due proof of the completion of said works to said capacity of 1647 second feet, or made due proof of the completion of said works to any capacity, whatever, and specifically deny that the United States, acting through the Secretary of the Interior, or any other officer of the United States, had the works so completed within the time named in said Permit No. 430 that it could make due proof of the completion of said works to the capacity of 1647 second feet, or any other number of second feet; and deny that the State Engineer of the State of Idaho examined said proof, and specifically deny that the State Engineer of the State of Idaho examined the works constructed under said Permit No. 430, or that he accepted said proof or issued to the United States, under said permit, a certificate of completion of the works to a capacity of 1647 second feet, or to a capacity of any number of second feet.

#### IV.

Answering paragraph VII of said Bill of Complaint, these defendants have not sufficient information or belief to enable them to answer as to whether

the United States has also made and perfected other filings and appropriations upon the waters of Boise River of later date than the one above described, and has constructed works of an additional capacity for the diversion thereof, but demand strict proof thereof.

V.

Defendants have no knowledge, information or belief as to enable them to answer the allegation that the said 1647 second feet is the first government appropriation from Boise River and is under date of priority of December 4, 1903, but demand strict proof thereof.

VI.

As to the allegations contained in paragraph IX of said Bill of Complaint, that the said 1647 second feet have been actually diverted through the said irrigation works of the Government Boise Project, and applied to the beneficial use in the irrigation of the lands included in said project, these defendants have not sufficient information or belief to enable them to answer, but demand strict proof thereof.

VII.

Admit the allegations contained in paragraph X of said Bill of Complaint.

VIII.

Answering paragraph XI of said Bill of Complaint, admit that the complainant, the United States of America, was not a party to said suit, nor served with process, but deny that its rights in and to the



subject matter of said action were not determined in said decree, and deny that said decree did not purport to determine the rights of the United States and all other parties or persons interested in the subject matter of said action, including the United States, and deny that said decree did not purport to determine the rights of any of the parties thereto as against the United States; but, on the contrary, these defendants, and each of them, allege that the complaint in said action on which the decree mentioned in paragraph X of Plaintiff's Bill of Complaint was entered was filed in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, now the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, at 4 o'clock P. M., August 20, 1902, at which time the plaintiff herein had no right, title or interest in or to the use of any water of Boise River, and was not a necessary party.

#### IX.

Admit all the allegations of paragraph XII of Plaintiff's Bill of Complaint, excepting the allegation contained in the following words, "and vacated the order of the District Court," but defendants, and each of them, deny that said Supreme Court vacated the order of the District Court.

#### X.

Deny that each year since said decision of the Supreme Court for a period of four years past, the

District Court has each year made a temporary order or decree for that year, or any portion of the year, except as hereinafter alleged, or established for each year a higher duty of water than that provided in the decree of the District Court of 1906, except as hereinafter alleged; and denies that the said District Court has ever established six-tenths of an inch per acre as the duty of water for any season, but, on the contrary, allege that during the early part of the irrigation season there is an abundance of water in Boise River to supply all the appropriators named in said decree with water to the amount so named, and that each year during the latter part of July, or the early part of August, the waters of Boise River become insufficient to supply the appropriators named in said decree with the amount so named, and remain so during the remainder of said season, and that ever since said decision of the Supreme Court of the State of Idaho, and for four years last past, there was, and is, a general understanding among the attorneys in the case of the Farmers Co-operative Ditch Company, a corporation, vs. the Riverside Irrigation District, a corporation, et al., that the said decree as above set forth should be followed each year until such times as the waters of Boise River become insufficient to supply the appropriators named in said decree, and that when said waters of the Boise River become insufficient to supply the said appropriators of Boise River in accordance with the terms of said decree, an appropriator who has a late appropriation came into said district court, the court which has



the jurisdiction of said action, asking that a temporary order be made by said district court for a higher duty of water than that named in said decree during the remainder of the irrigating season for that specific year; and that each year during the four years last past, an appropriator who is a late appropriator under said decree of the waters of Boise River, has filed a petition in the said District Court, during the latter part of July or the early part of August,, and on such petition has obtained a temporary order from said District Court, establishing a higher duty of water than that established in the decree above mentioned during the remainder of such irrigation season or until a further order of the court, which temporary order had for its basis a certain per cent or part of the water allotted under the original decree. That during each irrigating season during said time, and in accordance with said understanding, as above alleged, the Water Commissioner and Water Master of Boise River distributed the water of Boise River under said decree and until such times when they were directed to do differently by said temporary order.

## XI.

Deny that six-tenths of a miner's inch per acre has been found by actual use and experience, or actual use or experience, during the period of four years, or at any other time, or at all, to be sufficient for the irrigation of the lands entitled to receive water from Boise River, but on the contrary allege that it has been found by actual use and experience that it re-

quires one miner's inch per acre to irrigate the lands entitled to receive water from Boise River during the early part of the irrigation season and until about July 20th of each year and that a less amount per acre has been found to be sufficient during the remainder of the irrigation season.

## XII.

Answering paragraph XVI of said Bill of Complaint, deny that the order and decree entered by the District Court in 1906 is not now in effect.

## XIII.

Defendants deny that at the present time no order or decree of any kind has been issued by the court for the distribution of the water during a part of the irrigation season of 1913, or that no party has presented to the court an application for a temporary order of the court to distribute the waters of Boise River for a portion of the season of 1913, but on the contrary allege that the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, had, and has had, for seven years last past, jurisdiction of the subject matter of this action, and that on or about the . . . . . day of July, 1913, a petition was filed in said court by the New York Canal Company, Limited, one of the defendants and cross-complainants in said action, asking for a temporary order, and that notice was given by Cavanah, Blake & MacLane, attorneys for said defendant, the New York Canal Company, Limited, which notice is hereinafter set out in paragraph V



of defendants' further answer, and is hereby referred to and made a part hereof; and that on or about the 18th day of July, 1913, the said District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, made an order upon said petition, which order is set out in paragraph V of defendants' further answer, and is hereby referred to and made a part hereof.

#### XIV.

Answering paragraph XVIII of said Bill of Complaint, deny that the amount of the rights of the several appropriators from Boise River is not now decreed by the court, or that no order has been issued for the distribution thereof, but on the contrary allege that the amount of the rights of the several appropriators from said Boise River was decreed by the District Court of the Third Judicial District on the 18th day of January, 1906, as heretofore alleged in said Bill of Complaint, and that said order and decree is now in force and effect, and governs the distribution of water to the several appropriators from said Boise River.

#### XV.

Answering paragraph XIX, admit that Elias Marsters and E. F. Lakin are respectively water commissioner and water master, having charge of the distribution of water from said Boise River. Deny that said Elias Marsters and E. F. Lakin, without authority of any decree or order of the court, have gone upon the Government diversion works, or have threatened to interfere with the Government head-

gates, or to break or unlock the locks on the Government headgates, or shut down the Government headgates, or put in effect the said decree of the District Court of 1906, or to deliver to certain canals water in excess of one miner's inch per acre, or to shut the water out of the Government Canal in violation of the decision of the Supreme Court, or without authority, in any manner whatsoever, save by the authority and in the manner hereinafter in this answer set forth.

### XVI.

Answering paragraph XX of said Bill of Complaint, these defendants, and each of them, deny that there was an abundance of water flowing in Boise River at the time of the filing of said Bill of Complaint to supply the appropriations made in said decree and the complainant herein, and other appropriations made subsequent to said decree, upon the basis of six-tenths of a miner's inch per acre, or any other reasonable or proper duty of water, but, on the contrary, allege, that during the latter part of July and August of each year, there is not sufficient water in Boise River to give the appropriations contained in said decree six-tenths of an inch per acre.

### XVII.

Defendants, and each of them, deny that the said Government Boise Project includes approximately 240,000 acres of land, or any other number of acres of land over and above 150,000 acres of land.

### XVIII.

Answering paragraph XXII of said Bill of Complaint, deny that of this amount about eighty thou-



sand acres, or any other number of acres, has a partial water supply from other sources prior to the construction of the Government irrigation works, or is under contract to the Government for a supplemental supply of water from the Government works. And deny that about one hundred and sixty thousand acres, or any other number of acres, was entirely without water supply until the construction of the Government irrigation works, or has no other source of supply of water except from the Government works.

#### XIX.

As to the allegations contained in paragraph XXIII. of said Bill of Complaint, that upon 160,000 acres, about 2,000 homestead entrymen and land owners have settled with their families, and have cleared the land and put it under cultivation, and are growing crops thereon, which crops will be ruined and destroyed if they are deprived of water with which to irrigate the same, and that the settlers and entrymen are also dependent upon the water supply from the Government canal for necessary water for domestic purposes, and for the purpose of watering their stock, these defendants have not sufficient information or belief to enable them to answer, but demand strict proof thereof.

#### XX.

Answering paragraph XXIV of said Bill of Complaint, these defendants, and each of them, deny that six-tenths of a miner's inch per acre is a reasonable and proper duty of water during the whole of the

irrigation season, or that one miner's inch per acre during a portion of the irrigation season is an excessive or wasteful duty of water, but on the contrary allege that during a portion of an irrigation season, to-wit, from the commencement of the irrigation season to about the 20th day of July of each season, a reasonable and proper duty of water is one miner's inch per acre, and that for the remaining portion of an irrigation season a less amount than one miner's inch per acre is a reasonable and proper duty of water, but that six-tenths of an inch is too high a duty of water even for said portion of an irrigation season; and deny that under a reasonable and proper duty of water the crops on thousands of acres of land under the Boise project would be saved from loss and injury.

## XXI.

Answering paragraph XXV of said Bill of Complaint, deny that any injury will be done to any entryman or to the United States, if said water supply is shut off.

## XXII.

Answering paragraph XXVI of said Bill of Complaint, deny that said complainant will be damaged in the sum of \$10,000.00 per day, or any other sum or amount for each or every or any day that the water is shut out of said Government's canal, but specifically deny that the water has, at any time, been wrongfully and illegally, or wrongfully or illegally shut out of said Government's canal by these defendants, or either of them, or that defendants, or any



of them, wrongfully or illegally threatened to do so.

These defendants, and each of them, for a further and affirmative defense to said Bill of Complaint, allege as follows:

# I.

That on the 18th day of January, 1906, the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, now the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County, rendered its decree establishing the priorities of the different appropriators of the waters of Boise River, and the amount of water which each appropriator was entitled to, as follows, to-wit:

No.	Appropriator.	Inches.	Date of Priority.
1	Thomas Davis .....	110	June 1, 1864
2	Jacobs Canal Co. ....	1000	June 1, 1864
3	The Middleton Mill Ditch Co. ....	640	June 1, 1864
4	Thomas Andrews .....	165	June 1, 1864
5	T. C. Catlin and Polette Mace .....	143	June 1, 1864
6	T. C. Catlin .....	165	June 1, 1864
7	C. C. Havird .....	165	June 1, 1864
8	Pioneer Dixie Ditch Co..	1000	Sept. 1, 1864
9	Siebenberg Co-operative Ditch Co. ....	671	June 1, 1865
10	Allen V. Webster .....	60	June 1, 1865
11	J. F. Yaryan .....	33	June 1, 1865

12	James L. Graham, Frank N. Graham and Wil- liam Gilbert . . . . .	220	June 1, 1865
13	Eureka Water Co. . . . .	1666	June 1, 1865
14	New Union Ditch Co. . . .	688	June 1, 1865
15	Boise Valley Irrigation Ditch Co. . . . .	2729	June 1, 1865
16	W. H. Ridenbaugh and A. Rossi . . . . .	460	June 1, 1865
17	W. H. Ridenbaugh and A. Rossi . . . . .	13290	June 1, 1865
18	The Denver and Idaho Land Co. . . . .	40	June 1, 1865
19	Marthat Bowman . . . . .	144	June 1, 1865
20	Bird Bowman . . . . .	320	June 1, 1865
21	G. W. Gess . . . . .	145	June 1, 1865
22	Robert McGuire . . . . .	160	June 1, 1865
23	C. W. Cooper . . . . .	160	June 1, 1865
24	J. D. Rowland . . . . .	120	June 1, 1865
25	Draper & Wells . . . . .	197	June 1, 1865
26	Thomas J. Palmer . . . . .	80	June 1, 1865
27	Noah W. Palmer . . . . .	79	June 1, 1865
28	J. N. Tucker . . . . .	350	June 1, 1865
29	Thomas Andrews . . . . .	300	June 1, 1865
30	Joseph Perrault and Rich- ard Z. Johnson . . . . .	2500	May 1, 1866
31	William P. Kennedy . . . .	130	June 1, 1866
32	Frank L. Leonard, Edna C. Leonard, J. S. D. Manville and Estate of Albert Shervin . . . . .	175	June 1, 1866



33	Boise City Canal Co. . . .	1903	June 1, 1866
34	Franklin Ditch Co. . . . .	770	June 3, 1866
35	Canyon County Water Co.	3790	June 1, 1867
36	Martha E. McCarthy . . .	705	June 1, 1868
37	H. D. Goodman and Dora Goodman . . . . .	185	June 1, 1868
38	T. T. Johnson . . . . .	160	June 1, 1868
39	C. B. Ross, C. H. Allen, Edgar Dilley and W. H. Ross . . . . .	427	June 1, 1868
40	S. S. Gray . . . . .	70	June 1, 1868
41	John Mammon . . . . .	90	June 1, 1869
42	Isaac Bedal . . . . .	80	June 1, 1869
43	Frederick Oda . . . . .	180	June 1, 1869
44	Prior Burnett . . . . .	425	June 1, 1869
45	Pioneer Dixie Ditch Co..	1772	June 1, 1869
46	The Mason Creek Ditch Co. . . . .	1860	June 1, 1869
47	T. W. Boone . . . . .	175	June 1, 1869
48	W. J. Hamming . . . . .	130	June 1, 1870
49	The State of Idaho and others (Pioneer Canal)	1286	June 1, 1870
50	The Barber Lumber Co..	112	June 1, 1870
51	Thomas Andrews . . . . .	65	June 1, 1870
52	T. C. Catlin and Polette Mace . . . . .	393	June 1, 1871
53	Peter Meeves . . . . .	90	June 1, 1871
54	The Middleton Mill Ditch Co. . . . .	1685	June 1, 1871
55	J. F. Yaryan . . . . .	35	June 1, 1872
56	J. F. Yaryan . . . . .	70	June 1, 1872

57	Mary G. Davis .....	220	June 1, 1872
58	Edward N. Hart .....	165	June 1, 1872
59	T. W. Boone .....	110	June 1, 1874
60	The Farmers' Co-operative Ditch Co. ....	500	June 1, 1875
61	Heirs of Edward and Ma- ry Clark .....	115	June 1, 1876
62	John Cecil .....	22	June 1, 1876
63	Thomas H. Aikens .....	260	June 1, 1877
64	W. H. Conway .....	45	June 1, 1877
65	Middleton Water Co. ...	5704	June 1, 1877
66	Joseph Perrault and Rich- ard Z. Johnson .....	10000	July 1, 1877
67	Nampa and Meridian Ir- rigation District .....	8500	May 1, 1878
68	John Mammon .....	210	June 1, 1878
69	Julia Mammon .....	168	June 1, 1878
70	Charles Allen .....	440	June 1, 1878
71	R. H. Stockton .....	220	June 1, 1878
72	New Dry Creek Ditch Co.	1566	June 1, 1879
73	D. Mumford .....	200	June 1, 1879
74	Smith Stockton .....	88	June 1, 1880
75	Isham Joplin .....	120	June 1, 1880
76	Joseph Goble .....	45	Oct.20, 1880
77	Franklin Ditch Co. ....	1380	Oct.29, 1880
78	Allen V. Webster .....	45	June 1, 1882
79	Susie Campbell .....	30	June 1, 1882
80	J. T. Barber .....	80	June 1, 1882
81	Sonora Joplin .....	170	June 1, 1882
82	S. W. Hutchinson .....	22	June 1, 1882
83	Johnson .....	22	June 1, 1882



84	Andrew J. Joplin .....	143	June 1, 1882
85	James L. Graham .....	110	June 1, 1882
86	The Farmers' Co-operative Ditch Co. ....	1000	June 1, 1883
87	Francis M. Joplin .....	45	June 1, 1883
88	W. A. Black .....	600	June 1, 1883
89	Eureka Ditch Co. ....	1085	Nov. 9, 1883
90	Pioneer Irrigation Dist..	2655	June 1, 1884
91	Riverside Irrigation Dis- trict .....	1000	June 1, 1884
92	The Settlers' Canal Co...	4953	Oct.17, 1884
93	New Dry Creek Ditch Co.	761	June 1, 1886
94	Thomas Davis .....	670	June 1, 1886
95	William C. Young, Lizzie Young and Estella Young .....	200	Jan.23, 1887
96	American Ditch Associa- tion .....	2390	Oct. 1, 1887
97	New Dry Creek Ditch Co.	393	June 1, 1888
98	A. V. Linder .....	200	June 1, 1888
99	Levi Smith .....	65	June 1, 1888
100	Charlotte Calhoun .....	70	June 1, 1888
101	E. J. Linder .....	73	June 1, 1888
102	Lizzie Everett .....	60	June 1, 1888
103	Jesse Wilson .....	70	June 1, 1888
104	Thomas Andrews .....	45	June 1, 1888
105	The Farmers' Co-Op. Ditch Co.....	2500	July 1, 1888
106	Nampa & Meridian Irrig. District .....	18542	Aug.20, 1888
107	Charles H. Miller.....	3	May 1, 1889

108	Loomis L. Hoseley.....	1	May 1, 1889
109	Steve Utter, John Utter & C. B. Taylor.....	120	May 1, 1889
110	South Boise Mutual Irrigation Co.....	300	May 1, 1889
111	Estate of J. H. Gallagher	147	May 1, 1889
112	Annie H. Togarty.....	21½	May 1, 1889
113	Grace Call.....	5	May 1, 1889
114	Samuel H. Canfield.....	11½	May 1, 1889
115	Sonora Joplin.....	3	June 1, 1889
116	Sonora Joplin.....	60	June 1, 1889
117	Pioneer Irrigation Dist..	10000	Sept. 1, 1890
118	W. H. Conway.....	110	June 1, 1891
119	Thomas Davis .....	27	June 1, 1891
120	The Middleton Ditch Co.	850	June 1, 1891
121	Thomas Andrews .....	175	June 1, 1891
122	The Settlers' Canal Co..	3572	June 1, 1891
123	Thomas H. Aikens .....	40	June 1, 1891
124	Riverside Irrig. District.	4000	May 1, 1893
125	R. H. Stockton .....	88	June 1, 1894
126	Farmers Union Ditch Co.	5500	July 2, 1894
127	Charles Rim & Jane Keoh	50	May 1, 1895
128	Mathew Casey.....	53	July 1, 1895
129	The Farmers Co-op. Ditch Co.....	4175	July 1, 1896
130	Riverside Irrig. District.	1000	Oct. 1, 1899
131	New York Canal Co.....	10955	Mar.23 1900
132	Canyon Ditch Co.....	500	May 17, 1900
133	Riverside Irrig. Dist....	3500	June 1, 1901
134	Canyon Ditch Co.....	277	Oct. 25, 1901
135	Pioneer Irrig. Dist.....	2817	Apr. 1, 1904



## II.

That the total amount of water decreed as aforesaid was 158,235 miners' inches or 3164.7 second feet.

## III.

That all said rights so decreed are prior and superior to the rights of the United States Government as alleged in said Bill of Complaint.

## IV.

That the said suit of the Farmers' Co-Operative Ditch Company, a corporation, vs. Riverside Irrigation District, a corporation, et al., in which said decree was entered as aforesaid, was commenced by the filing of an Amended Complaint on the 20th day of August, 1902, at 4 o'clock P. M., in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, (now the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County), and that at said time, and for a long time thereafter, the above named complainant had no right, title or interest in or to the use of any of the waters of Boise River.

## V.

That during the early part of the irrigation season there is an abundance of water in Boise River to supply all the appropriators named in said decree with water to the amount so named, and that each year during the latter part of July, or in the early part of August, the water of Boise River becomes insufficient to supply the appropriators named in

said decree with the amount so named, and remain so during the remainder of said season, and that ever since said decision of the Supreme Court of the State of Idaho, and for four years last past, there was, and is, a general understanding among the attorneys in the case of the Farmers' Co-Operative Ditch Company, a corporation, vs. the Riverside Irrigation District, a corporation, et al., that the said decree as above set forth should be followed each year until such times as the waters of Boise River become insufficient to supply the appropriators named in said decree, and that when said waters of the Boise River become insufficient to supply the said appropriators of Boise River in accordance with the terms of said decree, an appropriator who has a late appropriation came into said district court, the court which has the jurisdiction of said action, asking that a temporary order be made by said district court for a higher duty of water than that named in said decree during the remainder of the irrigation season for that specific year; and that each year during the four years last past, an appropriator who is a late appropriator under said decree of the waters of Boise River, has filed a petition in the said district court, during the latter part of July or the early part of August, and on such petition has obtained a temporary order from said district court, establishing a higher duty of water than that established in the decree above mentioned during the remainder of such irrigation season or until a further order of the court, which temporary order had for its basis a certain per cent or



part of the water allotted under the original decree. That during each irrigating season during said time, and in accordance with said understanding, as above alleged, the Water Commissioner and Water Master of Boise River distributed the water of Boise River under said decree and until such times when they were directed to do differently by said temporary order. That in accordance with said understanding, the New York Canal Company, Limited, one of the defendants and cross-complainants in the said suit of the Farmers' Co-Operative Ditch Company vs. Riverside Irrigation District, et al., filed in the early part of July, 1913, a petition asking for a temporary order, on which petition a notice was served on the different parties in said action, which notice is described as follows, towit:

*In the District Court of the Seventh Judicial District  
of the State of Idaho, in and for Canyon County.*

FARMERS' CO-OPERATIVE DITCH COMPANY,  
Plaintiff,

vs.

RIVERSIDE IRRIGATION DISTRICT, ET AL.,  
Defendants.

#### NOTICE.

*To the above-named Plaintiff and to all of the above-named Defendants and their Attorneys, with the exception of the New York Canal Company, Ltd., which Company is making the application herein.*

You and each of you will please take notice that the defendant, the New York Canal Company, Limited, will, on the 18th day of July, 1913, at the hour

of 2 o'clock, P. M. of said day, or as soon thereafter as counsel may be heard, at the Chambers of the Honorable E. L. Bryan, Judge of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, at Caldwell, Idaho, or in open court on said day, move the said Judge of the above entitled court to make an order authorizing and directing the Water Commissioner of the Third District of Idaho, during the remainder of the irrigation season of 1913, to distribute the water of the Boise River on the basis of six-tenths of an inch per acre for each acre of land watered from said river.

Said motion will be made upon the pleadings, files and record in the said cause, and affidavits filed, or hereafter to be filed.

CAVANAUGH, BLAKE & MACLANE,  
Attorneys for defendant, New York Canal  
Company, Limited,  
Residence, Boise, Idaho.

Dated July 11th, 1913.

and that on or about the 18th day of July, 1913, the said District Court of the Seventh Judicial District of Idaho, in and for the County of Canyon, made a temporary order on said petition, which order is as follows, to-wit:

*In the District Court of the Seventh Judicial District  
of Idaho, in and for the County of Canyon.*

FARMERS CO-OPERATIVE DITCH COMPANY,  
Plaintiff,

vs.

RIVERSIDE IRRIGATION DISTRICT, ET AL.,  
Defendants.



## ORDER.

Now on this 18th day of July, 1913, on the application of the New York Canal Company, Limited, one of the defendants and cross-complainants in the above entitled action, before the undersigned, Judge of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, came regularly on for hearing the evidence upon the part of said defendant and cross-complainant, New York Canal Company, Limited, and no evidence being offered by the plaintiff, nor any of the other defendants and cross-complainants, the undersigned Judge finds that all of the facts set forth in said application are true, and that the prayer of said application should be granted.

It is, therefore, ordered that from and after the date hereof and during the remainder of the irrigation season of 1913, the duty of water be, and the same is hereby fixed at six-tenths of a miner's inch per acre, measured at the point of diversion from Boise River, the same being six-tenths of the amount of water allotted under the original decree herein, and the Water Commissioner of the Third District of Idaho is hereby directed during the remainder of the irrigation season of 1913, to distribute the waters of Boise River in accordance to the priorities heretofore found by the Court in the above entitled cause, giving to each of said parties the proportion above specified, of the amount allotted under the original decree, namely, six-tenths of the original decreed amounts, being in effect for all lands a duty

of water of six-tenths of a miner's inch per acre measured at the point of diversion. The Capital Water Co. is excepted from this order.

Dated July 18th, 1913.

ED L. BRYAN,  
District Judge.

That the amount of water flowing in Boise River at the time of the acts complained of in complainant's Bill of Complaint did not exceed . . . . . second feet, to any of which the said complainant was not entitled.

VI.

That Section 3269, Revised Codes of Idaho, provides as follows:

"Sec. 3269. There shall be appointed one water commissioner for each of the water divisions by this chapter created, who shall be appointed by the Governor, with the consent of the Senate, and who may be removed for cause. Said water commissioners shall each be appointed to hold office for a period of six years, or until their successors are appointed, and shall have qualified, one commissioner retiring and his successor being appointed each odd numbered year; *Provided*, That the present commissioners shall hold office until the expiration of their respective terms. Such water commissioners shall possess such theoretical knowledge of the science of hydraulics as will enable them to supervise the construction of such measuring devices as may be necessary to place in any ditch, canal or



stream for the proper measurement of the water. They shall be acquainted with the streams of their divisions and shall be capable of instructing the water master who may be placed in charge of such streams in all matters in relation to the distribution of the water of such streams in accordance with the priorities of the rights of those using such waters."

That Section 3270, Revised Codes, provides as follows:

"Sec. 3270. Each commissioner shall reside in the water division for which he is appointed. The commissioner of each water division shall have immediate direction and control of the acts of the water masters, and of the distribution of water from all the streams to the canals diverting therefrom in his division, and shall perform such duties as shall devolve upon him as a member of the Board of Irrigation. He shall also, under the general supervision of the State Engineer, execute the laws relative to the distribution of water in accordance with the rights of priority of appropriation. He shall also, when so directed by the State Engineer, receive proof of completion, and make inspection and examination as provided in section 3258 of this title, of works for the diversion and application of water under any permit, where the point of diversion of said works is located within the boundaries of his division; and he shall also, when so directed by the State Engineer, receive

proof of the beneficial use of waters diverted under the provisions of this title in cases where the majority of the lands benefited by the diversion works in question lie within the boundaries of his division.”

That Section 3274, Revised Codes of Idaho, as amended by House Bill No. 68, Tenth Session Legislature State of Idaho, provides as follows:

“Sec. 3274. The Board of Irrigation shall divide the State into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district; *Provided*, That any streams or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles may be divided into two (2) or more water districts; and *Provided*, That any stream tributary to another stream may be constituted into a separate water district when the use of the waters therefrom does not affect or conflict with the rights to the use of the waters of the main stream; and *Provided*, That any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district; and, *Provided*, That this section shall not apply to streams or water supplies whose priorities of



appropriation and use have not been adjudicated by the courts having jurisdiction thereof.”

That Section 3275, Revised Codes, as amended by House Bill 68, Tenth Session of the Legislature of the State of Idaho, provides as follows:

“Section 3275. There shall be held on the first Monday of March of each year, commencing at 2 o'clock P. M., a meeting of all persons owning or having the use of any adjudicated right, in the waters of the stream or water supply comprising such district. Such meeting shall be held at some place within the water district, convenient to a majority of those entitled to vote thereat, which place shall be designated by the water commissioner of the district, and he shall, between January first and February first of each year, file such designation with the county auditor of the county or counties within which such water district is situated and shall notify by mail all persons, companies or corporations known by him to own or claim the use of the waters of such district, and should said water commissioner fail to file such designation by February first, the district judge of the district within such water district or portion thereof, is situated shall, upon application of some interested person, designate the place of holding such meeting, and in case the first Monday in March has passed, such district judge may also designate the time of holding such meeting.

At such meeting there shall be elected a water master for such water district, and such other regular assistants as such meeting shall deem necessary, and such meeting shall, prior to the election of such water master and assistants, fix the compensation to be paid them, such compensation not to exceed four dollars (\$4.00) per day, during the time actually engaged in the performance of their duties. At such meeting each person present owning or having the use for the ensuing irrigation season of any adjudicated right equal to ten (10) inches of water in the stream or water supply comprising such water district shall be entitled to one (1) vote. Such meeting shall choose a chairman and secretary and shall determine the manner and method of electing water masters and assistants. Within five (5) days after such meeting the chairman and secretary shall forward a certified copy of the minutes of such meeting to the Water Commissioner of the district; *Provided*, That a corporation shall be considered a person for the purpose of this section and shall cast its vote by some one to be designated by the corporation; and *Provided*, That each stockholder in said corporation shall be entitled to as many votes as he shall have units of ten miners' inches of water, regularly adjudicated, in the stream or water supply comprising such water district; and *Provided*, That should said meeting not be held or not choose a water master, or not fix the com-



pensation thereof, then the Water Commissioner of the district may appoint such water master and fix his compensation not exceeding four dollars (\$4.00) per day.

The Water Commissioner may, at any time, remove any water master within his division for failure to perform his duty as such watermaster, upon complaint in that respect being made to him in writing by any person owning or having the right to the use of an adjudicated right in such district, and the Water Commissioner may appoint a successor for the unexpired term.

Before entering upon the duties of his office, said water master shall take and subscribe an oath before some officer authorized by the laws of the State to administer oaths, to faithfully perform the duties of his office, and shall file with the Clerk of the District Court in the county in which said water master resides, said oath and his official bond in the penal sum of five hundred dollars (\$500.00), with not less than two sureties, to be approved by the judge of the probate court of the county in which he resides, and conditioned for the faithful discharge of the duties of his office."

That Sec. 3276, Idaho Revised Codes, provides as follows:

"Section 3276. All water masters shall make reports to the Water Commissioner of their division as often as may be deemed necessary by

said commissioner. Said reports shall contain the following information: The amount of water necessary to supply all the ditches, canals and reservoirs of the district; the amount of water actually coming into the district to supply such ditches, canals or reservoirs, whether such supply is on the increase or decrease; what ditches, canals and reservoirs are at times without their proper supply, and the probability as to what the supply will be during the period before the next report will be required, and such other information as the Water Commissioner of the division may suggest. Said Water Commissioner shall carefully file and preserve such reports, and shall from them ascertain what ditches, canals and reservoirs are, and what are not, receiving their proper supply of water, and if it shall appear that in any district of that division, any ditch, canal or reservoir in another district as ascertained from his register, he shall at once order such post-date ditch, canal or reservoir shut down, and the water given to the elder ditch, canal or reservoir, his orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals or reservoirs may be located. The reports of water masters to the Water Commissioners of irrigation shall be filed and kept in the office of the State Engineer."



That Section 3277, Revised Codes, as amended by House Bill 68, Tenth Session Legislature of the State of Idaho, provides as follows:

“Section 3277. It shall be the duty of said water master to distribute the waters of the public stream, streams, or water supply, comprising his water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, under the direction of the Water Commissioner of his district, the headgates of ditches heading from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; *Provided*, That any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein, shall, for the purpose of distribution, during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates of ditches having no adjudicated right if necessary to supply adjudicated rights in such stream or water supply.”

## VII.

That Elias Marsters, one of the above named defendants, was, during the month of July, 1913, and

ever since has been, and now is, the duly appointed, qualified and acting water commissioner of Water Division No. 3 of the State of Idaho.

VIII.

That E. F. Lakin, one of the above named defendants, was, during the month of July, 1913, and ever since has been and now is, the regularly elected, qualified and acting water master of the Boise River.

IX.

That pursuant to the authority granted them by the said statutes above mentioned, and decrees and order of the said District Court of the State of Idaho, the said Elias Marsters and E. F. Lakin are, and have been during the irrigation season of 1913, distributing the waters of the Boise River to the parties entitled thereto.

X.

That the granting of an injunction in this case enjoining these defendants from administering and distributing the water of said Boise River, and from so regulating the gates of said Government diversion works as to allow the proper amount of water to the various appropriators, above mentioned, superior in time and right to the said complainant, would work great and irreparable injury against all of said appropriators.



*And Further Answering, and for a Second Affirmative Defense, These Defendants Say:*

I.

That the said Bill of Complaint fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein.

II.

That the said Bill of Complaint shows upon its face that this court is without jurisdiction of the subject matter of this action.

III.

That the said Bill of Complaint fails to allege facts sufficient to constitute a cause of action against said defendants, or either of them:

FIRST—For the reason that it fails to allege the appropriators of the waters of Boise River whose appropriations are prior in time to said plaintiff and the amount to which each is entitled.

SECOND—For the reason that said Bill of Complaint fails to allege that the complainant is entitled to the water so turned out of the said Government works ahead of and prior to and under rights and appropriations superior to those appropriators to whom said defendants are, and were, at the time of the commission of the acts alleged in said Bill of Complaint, delivering and distributing said water; and fails to allege the amount of water to which the complainant is so entitled.

THIRD—For the reason that said Bill of Complaint fails to allege the amount of water in Boise

River to which the complainant was entitled under its rights of appropriations ahead of and prior to other appropriators from Boise River, at the time of the commission of the acts complained of in said Bill of Complaint.

FOURTH—For the reason that said Bill of Complaint fails to allege that said complainant was entitled to divert the amount of water, or any of the water which it was diverting at the time of the commission of the acts complained of in said Bill of Complaint.

#### IV.

That said Bill of Complaint is defective, in that it does not join as parties defendant all other appropriators of the waters of Boise River. That all the parties named in paragraph 1 of the first affirmative answer hereof should be made parties defendant in this suit for the reason that they were parties to the said action of Farmers Co-operative Ditch Company, Plaintiff, vs. Riverside Irrigation District, et al., Defendants, mentioned in said Bill of Complaint, and are interested in the subject matter of this suit.

#### V.

That the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, in said suit of Farmers Co-operative Ditch Company, Plaintiff, vs. Riverside Irrigation District, et al., Defendants, mentioned in complainant's Bill of Complaint, now has, and has had, for four years last past, jurisdiction of the subject matter of this suit, and in said suit said district court



now holds, and has had, during all of said time, jurisdiction of all the water flowing in Boise River, at the time of the commission of the acts complained of in complainant's Bill of Complaint; which said suit has been set by said District Court for hearing and determination on January 5, 1914.

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*Having Thus Made Full Answer to All the Matters and Things Contained in the Bill, These Defendants Pray:*

FIRST—That all proceedings be stayed until the said District Court which had the jurisdiction of the subject matter of this suit prior to this Court, shall have determined the rights of the parties hereto.

SECOND—That the complainant take nothing by this action, and that the defendants be hence dismissed with their costs.

J. H. PETERSON,  
Attorney General.

J. J. GUHEEN.

T. C. COFFIN.

Of Counsel:

SCATTERDAY & VAN DUYN.  
THOMPSON & BUCKNER.  
HERBERT WING.

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State of Idaho,  
County of Ada,—ss.

Personally appeared before the undersigned authority, T. C. Coffin, one of the attorneys for the

defendants in the above cause, who, being duly sworn, deposes and says that he is one of the attorneys for the above named defendants in the above cause, and that the matters and things contained in the foregoing answer are true.

That he makes this affidavit on behalf of said defendants for the reason that both of said defendants are at this time absent from Boise City, State of Idaho, where this affiant resides.

T. C. COFFIN.

Subscribed and sworn to before me this 1st day of December, 1913.

(Seal)

I. W. HART,

Clerk of the Supreme Court of the State of Idaho.

Endorsed: Filed Dec. 1, 1913. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,

VS.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

### SUPPLEMENTAL BILL OF COMPLAINT.

Permission of the court having been first asked and received, the Complainant files this its Supplemental Bill of Complaint, and alleges:

#### I.

That after making the threats described in the Bill of Complaint herein, the Defendants, Marsters and



Lakin, and with them certain other persons employed by them, and acting under their direction and control, on the 11th day of July, 1913, went to the said Section Three (3), Twp. Two (2) North, Range Three (3) East, B. M., the reserved public lands of the United States, withdrawn from all forms of entry and reserved and set aside under the first form of reservation authorized by the said Reclamation Act of June 17, 1902, and wrongfully and without any right, authority or permission, and without any order or decree of court, went upon said withdrawn lands of the United States and upon the Diversion Dam, headgates, main canal and other irrigation works of the United States, constructed on said lands, and took possession of said works and with force and violence broke the locks and chains on said headgates of the United States and turned out of said canal the water included in the Complainant's said water appropriation described in the Bill of Complaint herein, and wrongfully and illegally and without any right or authority, kept possession of said irrigation works and deprived the Complainant of the use and benefit of said reserved public lands of the United States and of said dam, headgates, canal and irrigation works, and of said water and water appropriation from said 11th day of July, 1913, until the end of the irrigation season, to-wit, October 31, 1913, to the great damage of the Complainant.

## II.

That said dam, head-works, and canal cost and are reasonably worth more than One Million (\$1,000,-

000) Dollars, and that the reasonable rental value of said irrigation works is Two Hundred (\$200.00) Dollars per day for each day from July 11th to October 31st, inclusive.

### III.

That, pending the formal opening of said Boise Project, the Complainant has made contracts with the settlers, entrymen and land owners of said Government Boise Project for furnishing water to said settlers, entrymen and land owners for irrigation and domestic purposes to enable them to raise crops and secure water for stock and domestic purposes, and under said contracts said settlers, entrymen and land owners have agreed to pay for such water at the rate of forty (40c) cents per acre foot for the season of 1913, and that by the said trespass of the Defendants, and their aforesaid wrongful and illegal acts, the Complainant has been deprived of the use of said water and the rental value thereof and the receipts from said water rentals, to the great damage of Complainant, and that the Complainant has been damaged in the loss of said water rentals in the sum of Fifteen Thousand Dollars.

### IV.

That approximately eighty thousand acres of land were actually being irrigated and farmed on said Boise Project during the season of 1913, and that about one-half thereof is public land of the United States and the property of the United States, which has been entered under the said Reclamation Act, but title to which has not yet passed from the United



States, and that by said wrongful and illegal acts of the Defendants in shutting off the said water, the said lands of the Complainant have been damaged and injured in the value thereof to the amount of Ten Thousand (\$10,000) Dollars.

#### V.

That in connection with the construction of said Boise Project and for use in the construction of the Arrowrock Dam and such commercial purposes and other purposes as can be incidentally supplied in connection therewith, the United States has constructed an electrical power plant at the said Government Diversion Dam and installed electrical machinery therein at a cost for said plant, machinery and installation of approximately Two Hundred Thousand Dollars, and has appropriated and filed upon the waters of Boise River under date of June 15th, 1909, for power purposes at said power plant and has completed said plant and diverted said waters for power purposes and applied the same to beneficial use in the generation of electrical power during the years 1912 and 1913 and is now and was during all the times mentioned in this Supplemental Complaint operating said power plant for the generation of electrical energy for use in the construction of the Arrowrock Dam and for commercial purposes.

#### VI.

That the water used at said power plant for power purposes returns to Boise River immediately below said Government Diversion Dam and is then avail-

able for the use of other appropriators, and that said use for power purposes does not in any way interfere with the use of said water by any other appropriator.

## VII.

That wantonly and wilfully and without any use or benefit to any person whatever, the Defendants took possession of the upper portion of the said Government canal about a mile in length from the head-gates thereof down to those certain waste gates thereon known as the Barber Wasteway, and ran through said portion of said canal and around said Government power plant a part of the water supplied to the lower canals on Boise River and wasted the same back into Boise River at said Barber Wasteway and thus deprived the Complainant of the use thereof at its said power plant for power purposes and greatly interfered with the operation of said power plant and caused the loss of power at said plant to the great damage of the Complainant, and that the Complainant has been damaged thereby in the loss of power and in interference with the operation of its power plant, in the sum of One Thousand Dollars.

## VIII.

That there is no decree or order of Court in effect determining the extent of the rights of any of the appropriators from Boise River, and that Defendants threaten to and will proceed in the same illegal manner in 1914 as in 1913, and that great and irre-



parable damage will be done to the Complainant and the several thousand water users under its said canal, unless restrained by an order of this court.

*Wherefore*, Complainant prays:

That the Defendants, their agents, subordinates, and employees and all persons acting under their direction and control, be forever enjoined and restrained by the order of this Court from going upon said reserved lands of the United States, or any part of said dam, headworks, power plant, headgates, canal or other irrigation works, or property of the United States, and that Defendants be forever enjoined and restrained from breaking, injuring or destroying any part thereof, or any locks, chains or other devices thereon, or in any way interfering with any of said works or the operation thereof.

That the Complainant have judgment against the Defendants for the damage done to the Complainant and suffered by the Complainant from Defendants' said wrongful and unlawful acts, to-wit, the sum of Forty-eight Thousand Dollars, and for costs of suit and for such other and further relief as to the court shall seem equitable and just.

C. H. LINGENFELTER,

United States Attorney for the District of Idaho.

B. E. STOUTEMYER,

Attorney U. S. R. S.,

Boise, Idaho.

Permission of the court to file the foregoing Supplemental Complaint is hereby given, Defendants to plead within 20 days after service of Supplemental Complaint.

F. S. DIETRICH,  
Judge.

November 1st, 1913.

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State of Idaho,  
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, on oath deposes and says:

That he is agent of the United States and U. S. Attorney for the District of Idaho, and makes this verification for and on behalf of the United States, and is authorized so to do.

That he has read the foregoing Supplemental Bill of Complaint, knows the contents thereof and believes the facts therein stated to be true.

C. H. LINGENFELTER.

Subscribed and sworn to before me this 1st day of November, 1913.

A. L. RICHARDSON,  
(Seal) Clerk.

Service by delivery of copy acknowledged this 1st day of November, 1913.

J. H. PETERSON,  
Attorney for Defendants.

Endorsed: Filed Nov. 1, 1913. A. L. Richardson,  
Clerk.



*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
VS.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

ANSWER TO SUPPLEMENTAL COMPLAINT.

These defendants, reserving all manner of exceptions that may be had to the many uncertainties and imperfections of the Supplemental Bill of Complaint, come and answer thereto, or to so much thereof as they are advised is material to be answered to, and say:

I.

Defendants, and each of them, deny that either of them made any threats, or that, after making any threats, if any, as described in the Bill of Complaint herein, that the defendants, Marsters and Lakin, or Marsters or Lakin, or with them any other person or persons employed by them, and acting under their direction or control, or otherwise, on the 11th day of July, 1913, or at any other time, or at all, wrongfully or without any right or authority or permission, or without any order or decree of court, went to said Section 3, Township 2 North of Range 3 East of the Boise Meridian, the reserved public lands of the United States, withdrawn from all forms of entry and reserved and set aside under the first form of the reservation authorized by the said Reclamation Act of June 17, 1902, or that they, or either of them, or

any person under their employ or acting under their or either of their direction or advice or control, wrongfully or without any right, authority or permission, or without any order or decree of court, went upon said withdrawn lands of the United States, or upon the diversion dam, headgate, or headgates, main canal, or other irrigation work or works of the United States, constructed on said land, or took possession of said works with force, or violently broke the locks and chains on said headgate or headgates of the United States, or turned out of said canal the water included in complainant's said water appropriation described in the Bill of Complaint therein, or that they, or either of them, wrongfully or illegally or without any right or authority, kept possession of said irrigation work or works, or deprived the complainant of the use or benefit of the said reserved public lands of the United States, or of said dam, headgate, or headgates, canal or irrigation work or works, or of any water to which the complainant was lawfully entitled under any water appropriation from Boise River, from the said 11th day of July, 1913, until the end of the irrigation season, or any other time, or at all, to the great, or any, damage of the complainant, and deny that any illegal or wrongful acts of the defendants, or either of them, resulted in great, or any, damage to the complainant.

## II.

Answering paragraph II of complainant's supplemental Bill of Complaint, said defendants, and each



of them, state that they have no knowledge, information or belief sufficient to enable them to answer the allegation that said dam, headgates and canal cost, and are reasonably worth more than one million dollars, and that the reasonable rental value of said irrigation works is \$200.00 per day for each day from July 11th to August 31st, inclusive, but demand strict proof thereof.

### III.

Answering paragraph III of Complainant's supplemental Bill of Complaint, these defendants, and each of them, state that they have no knowledge, information or belief sufficient to enable them to answer the allegations contained in paragraph III of said Bill of Complaint, and placing their denial on that ground, deny that, pending the formal opening of said Boise Project the complainant has made any contracts with any settlers, entrymen, or land owners, of said Government Boise Project for furnishing water to said, or any, settlers, entrymen or land owners, for irrigation or domestic purposes to enable them to raise any crops or secure water for stock or domestic purposes, or any purpose, or that under said contracts, or any contracts, said, or any, settlers, entrymen or land owners have agreed to pay for such water or any water at the rate of 40c or any other sum per acre foot for the season of 1913, or that by the said, or any, trespass of the defendants, or either of them, or that the aforesaid wrongful or illegal, if any, acts the complainant has been deprived of the use of said, or any, water to which the com-

plainant is entitled, or that the rental value or the receipts of the said, or any, water rental to the great or any damage of the complainant, or that the complainant has been damaged in the loss of said or any water rental in the sum of \$15,000.00 per day, or any other sum or amount per day for water rental to which the said complainant is entitled.

#### IV.

Answering paragraph IV of complainant's supplemental Bill of Complaint, these defendants, and each of them, state that they have no knowledge, information or belief sufficient to enable them to answer the facts alleged in the allegations contained in paragraph IV of complainant's supplemental Bill of Complaint, and placing their denial on that ground, deny that approximately 80,000 acres of land, or approximately any other number of acres of land, were, or are, actually being irrigated or farmed on said Boise Project during the season of 1913, or that about one-half, or any other part thereof, is public lands of the United States, or the property of the United States which has been entered under the Reclamation Act, or that title to which, or any part thereof, has not yet passed from the United States, or that any wrongful or illegal act or acts of the defendants, or either of them, in shutting off the said water, the said lands, or any lands, of the complainant have, or have been, damaged or injured in the value thereof to the amount of \$10,000.00, or any other sum or amount at all.



## V.

Answering paragraph V of complainant's supplemental Bill of Complaint, these defendants, and each of them, state that they have no knowledge, information or belief sufficient to enable them to answer the allegations alleged in paragraph V of said supplemental Bill of Complaint, and placing their denial on that ground, deny that in connection with the construction of said Boise Project, or for use in the construction of the Arrowrock Dam, or such commercial purpose or purposes, or any other purpose as can be incidentally supplied in connection therewith, the United States has constructed an electrical power plant at the said Government diversion dam, or installed electrical machinery therein at a cost of, for the said plant, machinery and installation, approximately \$200,000.00, or any other sum or amount, or at a cost for said plant, machinery or installation of any sum whatever, or that the complainant herein has appropriated or filed upon the waters of Boise River under date of June 15, 1909, or under any other date, or at all, for power for any purposes for said power plant, or at any other place, or has completed said plant or any plant or diverted any water for power purposes, or supplied the same to beneficial use in the generation of electrical power during the year 1912 and 1913 or during the years 1912 or 1913, or at any other time, or is now, or was, during the times mentioned in this supplemental Bill of Complaint, operating said power plant with water to which the said complainant is entitled, at the time of filing the supplemental complaint herein, for the

generation of electrical energy for use in the construction of Arrowrock Dam, or for commercial or any purposes.

## VI.

Answering paragraph VI of complainant's supplemental Bill of Complaint, deny that at the time of the filing of said complaint that the complainant was entitled to any water in Boise River, or that the water used in said power plant for power purposes returned to Boise River immediately below said Government Dam, or is then available for the use of other appropriator or appropriators, or that said use for power purposes does not in any way interfere with the use of said water by other appropriators.

## VII.

Answering paragraph VII of complainant's supplemental Bill of Complaint, these defendants, and each of them, deny that they wantonly or willingly or without any use or benefit to any person whatever, took possession of the upper portion of the said Government canal about a mile in length from the said headgate, or headgates thereof, down to those certain waste gates thereon known as the "Barvi Waste Gate," and ran through said portion of said canal, or around said government power plant, a part of the water supplied to the lower canal on Boise River, or wasted the same back into Boise River at said Barvi Waste Gate, or that the defendants, or either of them, wantonly or without any use or benefit to any person, deprived the complainant of the use of any water at its said power plant for power purposes



or greatly interfered with the operation of said power plant, or caused the loss of power in said plant to the great, or any, damage of the complainant, or that by any wrongful, illegal or wanton act or acts of the defendants, or either of them, the complainant has been damaged in the loss of power or in the interference with the operation of its power plant in the sum of \$1,000.00 or in any other sum at all.

### VIII.

Answering paragraph VIII of complainant's supplemental Bill of Complaint, these defendants, and each of them, deny that there is no decree or order of court in effect, determining the extent of the rights of any of the appropriators on Boise River, or that the defendants, or either of them, threaten to, or will proceed in any illegal manner in 1914, or that they have at any other time proceeded in an illegal manner, or that on account of any illegal or wrongful act or acts of the defendants, or either of them, the complainant, or any of the water users under its said canal, have suffered great, or any, great or irreparable, or any, damage, or that they, or any of them, will, unless restrained, suffer great or irreparable or any damage, unless restrained by order of this court.

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*These defendants, and each of them, for a further and affirmative defense to said supplemental Bill of Complaint, allege as follows:*

### I.

To avoid repetition, said defendants, and each of

them, hereby refer to and incorporate as a part of this affirmative defense, paragraphs I, II, III, IV, V, VI, VII, inclusive, of defendants' further and affirmative answer to said Bill of Complaint, and by reference make the facts alleged in each and every paragraph thereof a part of this answer as fully as though the same were set out in full in this answer, which said paragraphs are hereby referred to and made a part hereof.

## II.

To avoid repetition, said defendants, and each of them, hereby refer to and incorporate as a part of this affirmative defense, paragraphs I, II, III, IV, V, inclusive, of defendants' second affirmative defense in the answer filed to the original Bill of Complaint, and by reference make the facts alleged in each and every paragraph thereof a part of this answer as fully as though the same were set out in full in this answer, which said paragraphs are hereby referred to and made a part hereof.

*Having Made This Full Answer* to all the matters and things contained in said supplemental Bill of Complaint, these defendants pray:

1. That all proceedings be stayed until the said district court which had the jurisdiction of the subject matter of this suit prior to this court, and still holds said jurisdiction, shall have determined the rights of the parties thereto.

2. That the complainant take nothing by this ac-



tion, and that the defendants and each of them be here dismissed with their costs.

J. H. PETERSON,

Attorney General.

J. J. GUHEEN.

T. C. COFFIN.

Of Counsel:

SCATTERDAY & VAN DUYN.

THOMPSON & BUCKNER.

HERBERT WING.

State of Idaho,

County of Ada,—ss.

Personally appeared before the undersigned authority, T. C. Coffin, one of the attorneys for the defendants in the above cause, who, being duly sworn, deposes and says that he is one of the attorneys for the above named defendants in the above cause, and that the matters and things contained in the foregoing answer are true.

That he makes this affidavit on behalf of said defendants for the reason that both of said defendants are at this time absent from Boise City, State of Idaho, where this affiant resides.

T. C. COFFIN.

Subscribed and sworn to before me this 1st day of December, 1913.

(Seal)

I. W. HART,

Clerk of the Supreme Court of Idaho.

Endorsed: Filed Dec. 1, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the  
District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
VS.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

STATEMENT OF EVIDENCE ON APPEAL.

This cause came regularly on to be heard on the 10th day of June, 1915, before Honorable Frank S. Dietrich, Judge of the above entitled court, B. E. Stoutemyer, Esq., and James L. McClear, Esq., appearing for complainant, and E. G. Davis, Esq., and Herbert Wing, Esq., and Thompson and Buckner, Esqs., for defendants. Whereupon the following proceedings were had, to-wit:

MR. DAVIS: May we have the record show that an objection was made to the taking of any testimony, on the ground that this case involves the adjudication of water rights and priorities on the Boise River, this question having already been taken jurisdiction of by the District Court of the Seventh Judicial District of Idaho, and that the objection was overruled and that an exception is noted thereto?

THE COURT: Yes.

Lorin T. Kinert, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct Examination.* (Witness testifies:)

During the summer of 1913, I was employed at the power house of the Reclamation Service at the



head of the Main South Side Canal. This power house is so located that one side of the building fronts on the cut off wall of the dam at the head of the canal; it is on the down stream side between the river and the canal. I was at this power house about the 11th or 12th of July, 1913, when the defendants, Elias Marsters and E. F. Lakin, and other persons went to the dam. Mr. Marsters asked me to deliver the keys to him. I refused and asked to communicate with the Boise office of the Reclamation Service to determine what course I should pursue, and was informed by the party who answered me that I was to state that I had no authority to deliver the keys or to open or close the gates as demanded. Mr. Marsters and those assisting him then went out on the platform where the lift devices were located, took a pair of bolt cutters and cut the hasps of the locks and manipulated the gate to reduce the flow of water. They had a man stationed at the waste way some distance down the canal who came up and regulated the gate after that, for I don't know how long. I was on the day shift after these locks were cut for the remainder of the month of July, with the exception of days when I was possibly on leave. I believe these men continued to operate the gates during the remainder of July. There were two guards and they took up their quarters in the blacksmith shop belonging to the Reclamation Service. I noticed one of them had a pistol of some description on the day he left there. He was on the government property at the time I saw the pistol.

Here witness was handed a package containing seven small locks and stated that they were the locks that were cut by the defendant Marsters. These locks were offered and admitted in evidence as plaintiff's exhibit "A".

(Witness continues:)

These locks were cut out with a double lever bolt cutter by Mr. Marsters.

*Cross Examination.*

There were eight of these locks in use at one time on the headgate. I have only seven here and do not know where the other one is. These locks have been in a chest in the Reclamation Service power house. This chest has not been kept locked and anybody may have had access to it. The only thing which defendants did was to cut these locks, and to lower the gate admitting water into the Reclamation Service ditch, the effect being to decrease the amount of water going into the said ditch.

George Clyde Baldwin, being called and duly sworn as a witness on behalf of the plaintiff testified as follows:

*Direct Examination.* (Witness testifies.)

I am a hydraulic engineer in the water resources branch of the U. S. Geological Survey, detailed as district engineer in charge of the work of the branch in the district with headquarters at Boise, which covers the state of Idaho and portions of Oregon, Nevada and Wyoming. I was employed in this capacity during the summer of 1913. On the 11th of July, shortly before noon, I went to the diversion



dam in company with Colonel Marsters and others. I cannot say absolutely that I saw them break the locks, but I know they lowered the gates after they got up there. They were acting under the direction of Mr. Marsters, and I remember seeing Mr. Lakin and Mr. McConnell working at lowering the gates. I took measurements in the government canal to determine the extent to which the water was lowered. The first measurement I made was from 1:50 to 2:20 P. M., and it was still falling at that time and it showed a discharge of 142 second feet, under not specially favorable conditions for measuring. At any rate it showed less water than they wanted to have left in the canal so the gates were raised.

MR. DAVIS: May it please the Court, we object to this testimony, and ask that the testimony of the witness already given in answer to this last question be stricken out on the ground that damage cannot be predicated upon water which has not entered—upon the loss of water, rather, which has not entered the ditches of the plaintiff. The cases all hold that there is no right in the corpu of water flowing in the river, and that no damage can be predicated upon any water which may have been prevented from entering the diversion works of the plaintiff. If the court wishes authorities upon that proposition, I will be glad to cite them.

THE COURT: I hardly think I understand you. Do you mean to contend that if one has a water right and you close down his gates so that he can't use the water upon his land, he can't recover damages?

MR. DAVIS: He can't recover damages for the loss of so much water. He can recover damages for the loss to his crops, or any other incidental injury which may have occurred, but he can't recover damages for the loss of water per se.

THE COURT: But the only way you can get at the loss to the crop would be to show how much water you were deprived of the use of.

MR. DAVIS: In this case they ask for damages for the loss of so many acre feet of water, which is absolutely an incorrect theory, at so much per acre foot.

THE COURT: The objection is overruled.

MR. DAVIS: Note an exception.

(Witness continues:)

At the time I made my first measurement only 142 second feet of water were left in the canal. I did not make a measurement before it was turned out and do not know how much was in before. I have kept records of measurements of the amounts of water flowing in Boise river. We have several stations on the river. The nearest one to the diversion dam is what is known as the Highland Station, which is probably about a quarter of a mile above the Goose Neck bridge on the Arrow Rock railroad, and about two miles below the mouth of Moore's creek. I know of no canals diverting water from the river between the Highland gauging station and the diversion dam, nor of any tributaries of any consequence coming into the river between these points. I kept mea-



surements on the Boise River at that station during each day of that season. The amount of water flowing in Boise River at that station on the 11th day of July, 1913, was 2420 second feet.

Here witness was shown a VanDyke negative giving the record flow of the water in Boise river at the Highland Station for each day of the season of 1913. This was offered and admitted in evidence and marked plaintiff's Exhibit "B".

(Witness continues.)

I made a second measurement on July 11th after they had raised the gates to turn in more water. This was made from 5:35 P. M. to 6:40 P. M. and showed 238 second feet. I have a note here stating that the gates at the head were opened slightly during measurement, but head of water only began to reach the measuring station at the close of the measurement. It is my understanding that Mr. Marsters thought it best to turn in a little bit more and be on the safe side, as he expressed it, so that at the time we left the head of the canal there was more than 238 second feet running in the canal. I do not know how much more but I think the increase was not material.

*Cross Examination.* (Witness testifies.)

I made three actual current meter measurements during the month of July. On July 7th, July 12th and July 24th, and others in August and September of that year; but the local observer read the gauge at least once every day and possibly twice on some days. The meter measurements are used to define

a rating curve; they measure actual quantities of water whereas the gauge measurements only record the stage or elevation of the water. From this rating curve which is derived from the actual measurement, we are enabled to get a rating table giving discharge for any different stage of the stream so long as the relation between discharge and gauge height remains constant; and it is in that way that we measure the discharge for each day from the daily gauge height. July 11, 1913, is the only date on which I made measurements of the amount of water running in the government canal. I did not visit the locality again after that date.

George H. Bliss, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:  
*Direct Examination:* (Witness testifies:)

I am an engineer in the employ of the United States Reclamation Service acting as project manager of the Boise project. I occupied this position during the summer of 1913, and was so employed on the 11th day of July, 1913. The Boise project consists of the Boise River Diversion Dam, and Deer Flat Reservoir, the distribution system is about 1047 miles of canals and ditches, of which forty miles are main canal, including nine miles of Indian Creek covering approximately 243,000 acres of land of which 160,000 acres are dry lands which are dependent entirely on government water. By dry lands, I mean those that were dry at the time the project was conceived. Some of these lands have been irrigated since and are dependent upon the government pro-



ject for their water supply. In 1913, there were being irrigated 58,265 acres exclusive of the old New York lands, and of these there were between 18,000 and 20,000 acres, making from 76,000 to 78,000 acres irrigated under the government canal system during that season. This project was constructed by the United States under the Reclamation Act. The headgates of the Diversion Dam are located in lot 9, Sec. 3, Township 2 North, Range 3 East, B. M.

Here witness was shown a map which he identified as one of the Boise Project showing the location of the Diversion Dam and headgates and lands irrigated under the project. This map was offered and admitted in evidence and marked plaintiff's Exhibit "C".

(Witness continues:)

Witness was then shown a certificate from Mr. Balderston, former register of the United States Land Office which certificate sets forth that Lot 9, Lot 6 of Sec. 3, Twp. 2 North, Range 3 East, are now and have been since November 17th, 1903, unentered public lands of the United States, withdrawn from all forms of entry under the first form of withdrawal authorized by the Act of Congress of June 17, 1902. This is the land on which the government dam and headquarters are located. This certificate was offered and admitted in evidence and marked plaintiff's Exhibit "D".

The witness was here shown and identified a copy of water license No. 430 from the State of Idaho to

the United States. This water license was offered and admitted in evidence and marked plaintiff's Exhibit "E".

(Witness continues:)

I had records kept under my supervision of the flow of water in the government main canal during the summer of 1913. The water running in the canal prior to the time the locks were cut by Mr. Marsters and gates lowered was used for irrigation and stock and domestic purposes for the lands under the canal system. These lands were originally arid, were entirely dependent upon this water to mature crops; they had no other source of supply. The 18,000 or 20,000 acres of New York lands got their water from the government system, but they had a right of their own; that right was carried for them in the government canal. The right of the New York canal under the Stewart decree was 219 second feet. On the morning of July 11th, there were 980.4 second feet of water flowing in the government canal. At 6:20 P. M., this amount had been lowered to 261.2 second feet, the difference amounting to 719.2 second feet. These measurements were made at the gauging station just below the Barber wasteway known as M. C. No. 2. This difference would amount to 1438.4 acre feet per day. The amount flowing in the canal on July 12th at 4 P. M. was 236 second feet; therefore an additional amount of 25.2 second feet was cut out on July 12th. This was the last day that we have a record that he actually lowered our gate. We have the flow of the canal on



every day from that date on through the rest of the season, and it varied more or less. Mr. Marsters was in charge of the government gates from July 11, 1913, to October 3, 1913. We have an official record of the flow of water in the government canal for the remainder of the period that Mr. Marsters was in charge, and I have here a tabulated statement from July 11th to July 25th. This statement is based upon a rating curve for the main canal similar to the rating curve which Mr. Baldwin has delivered for the Boise River and our ditch riders take the gauge heights once or twice a day so we have the discharge of the main canal every day throughout the season. During a part of this period, we carried in the government canal besides the government rights and the right of the New York Canal Company some rights that were transferred to the canal from the lower river. We had a contract at that time with the Riverside Irrigation District by virtue of which we could deliver water from the Deer Flat Reservoir to their system and transfer any rights to which they might be entitled in the Boise River to our diversion works. We also had a contract with the Pioneer Irrigation District similar to this contract by which we got a portion of their water and transferred it to the diversion works in exchange for water furnished them out of the Deer Flat Reservoir. The amount of transferred rights varied in accordance with the right that they were entitled to in the river. The Phyllis Canal right No. 90, was for 53.1

second feet and the right No. 117 was for 200 second feet making the total of 253.1 second feet and we took one-third of that minus twenty second feet or 64.4 second feet was what we obtained from the Phyllis right. The amount exchanged with the Pioneer District under their four rights numbered 91, 124, 130 and 133 under the Stewart decree amounting to 190 second feet. We obtained all of that right while it existed in the river. Whenever their right was cut we cut the amount that we took into our canal. The total amount of these exchange rights in the canal would be 254.4 second feet at the maximum and 145 second feet at the minimum. We have a tabulated statement of water flowing in the government canal from July 11th to July 25th. On July 25th, we had a rain on the Boise River which raised the river and our water was turned back in although our gates were still controled by Marsters. The amounts of water flowing in the canal from July 11th to July 25th were as follows:

July 12th-13th, 312 second feet; July 13th-14th, 344 second feet; July 14th-15th, 435 second feet; July 15th-16th, 464 second feet; 16th-17th, 478 second feet; 17th-18th, 487 second feet; 18th-19th, 436 second feet; 19th-20th, 347 second feet; 20th-21st, 303 second feet; 21st-22d, 305 second feet; 22d-23d, 303 second feet; 23d-24th, 327 second feet; 24th-25th, 575 second feet.

On the 11th-12th there was no transferred water in the ditch; on the 12th-13th, there was 30 second feet; on the 13th-14th, there was 104 second feet;



on the 14th-15th, there was 233 second feet; on the 15th-16th, there was 254 second feet. This same condition existed to the 18th. From the 18th, 25th, there was 145 second feet of transferred water in the main canal. At that time 214 second feet of the New York Canal Company's decreed right was being carried in the government canal.

MR. DAVIS: What do you mean by decreed right?

MR. STOUTEMEYER: The right as decreed by Judge Stewart. The right which the government contracted to carry for them as decreed by the court.

(Witness continues:)

One second foot flowing for twenty-four hours is equivalent to 1.98 acre feet, practically two acre feet; and if you multiply the amount as expressed in second feet by 1.98 that would give you the number of acre feet for each twenty-four hours.

I have been connected with the project as project manager since July 1, 1912. Prior to that time, I had been irrigation manager from January 16, 1909 to July 1, 1912 in charge of the distribution of water. In that capacity, I became familiar with the amounts of water required for the raising of agricultural crops on the lands being irrigated under that project. The amount of water required for that purpose on July 11, 1913, was 980.4 second feet, and this amount was used for irrigation on that date. On that date, the United States was receiving forty cents an acre foot for the water delivered to

the farmer. The effect of cutting off water from the government canal by the defendant Marsters was to decrease the government's receipts. These receipts were decreased \$387.20 a day. There were thirteen days before the rain, occurring between July 25th and August 10th, giving us the water which we required, therefore there were thirteen days on which our water was decreased by that amount from July 12th to July 25th. The receipts were not decreased from July 25th to August 10th, but they were thereafter for sixty-one days during which Mr. Marsters had control of our gates.

Q. Were they decreased during all of that time except this period which you refer to?

MR. DAVIS: We object to that as leading.

THE COURT: I don't think I quite understand the witness. How do you know that they were decreased thereafter?

A. Because we didn't have sufficient water to meet our needs, our demands, except during this period in which the rains occurred, which gave us plenty of water, which was between July 25th and August 10th. After August 10th the river dropped again, and we were short of water from that time on to October 3d, when Mr. Marsters released the gates.

THE COURT: Do you know how much water you would have had, had he not lowered the gates, rightfully have had?

A. I don't know as I know what you mean by rightfully.



THE COURT: What you would have been entitled to take from the river. I say, do you know, under the conditions—

A. I was answering Mr. Stoutemyer's question on the assumption that we were entitled to what he cut out.

THE COURT: During the entire season?

A. Well, of course, if we were only entitled to—on the—I don't—there was a temporary order of the court in the meantime.

MR. STOUTEMYER: We propose to show those orders and rights by another witness, showing the value of the water by this witness.

THE COURT: I am willing to have you take a sort of short cut in this, if it can be done without prejudice to the parties. Of course, this conclusion would be rather an extraordinary one without showing the facts. Perhaps you had better show these orders first, and then I will have some idea as to about what the hearing of the testimony will be, and you can recall this witness.

Here plaintiff offered in evidence, and the same was admitted a certified copy of the order of the District Court of the Seventh Judicial District of the State of Idaho in the case of Farmers' Co-operative District vs. Riverside Irrigation District made by Judge Bryan on July 18, 1913. This was marked Plaintiff's Exhibit "F".

MR. STOUTEMYER: We notice in that order (Plaintiff's Exhibit "F" just above referred to), the order was made to distribute to the parties .6 of

an inch per acre, or .6 of the Stewart decree, the decree formerly made in this case. We have here the decree referred to upon which that .6 is based, but it is quite lengthy, and if there is no objection to it, we would like instead of offering the whole decree to merely offer the amounts shown by that decree to have been decreed to the several parties.

THE COURT: You mean the amounts and dates of appropriation?

MR. STOUTEMYER: Yes.

MR. DAVIS: You offer that as evidence, do you?

MR. STOUTEMYER: Yes.

MR. STOUTEMYER: We will ask that this portion of what is known as the Stewart decree be marked as plaintiff's exhibit and introduced in evidence.

Whereupon said paper was marked as requested and admitted in evidence as plaintiff's Exhibit "G".  
(Witness continues:)

There was no reduction in the expenses of the government for the distribution of water as the amount in the canal was reduced by defendants; we had a certain amount of water to deliver and we had to keep on our men to deliver it.

MR. STOUTEMYER: What effect upon the canal itself has the sudden reduction of the amount of water flowing in it, to the extent which occurred in this canal on the 11th or 12th of July?

MR. DAVIS: We object to that as being incompetent, irrevelant and immaterial and not within the issues of the pleading, which objection was by the



court sustained and plaintiff noted an exception.  
(Witness continues)

All of the works then completed were affected by the action of the defendants; the main canal was affected because we could not get the flow of water through it, and our lateral system was affected for the same reason, and the Deer Flat Reservoir was affected, inasmuch as we had to take water from that reservoir at that time that we could use later. The power plant was also affected by the possession of the gates by the water master. There was water diverted through the main canal and wasted at the Barber waste-way that was of no use to us in our irrigation, that could have gone through the power plant and created more power, provided it was necessary to waste it at all. We have a waste-way in the main canal approximately a mile below the head gates and they regulated the canal at that point rather than at the headgates. If they had regulated it at the headgates, that water would have gone through the power plant. As they did regulate it, it went through the waste-way and the power plant did not get the use out of it. We develop power at the diversion dam, and the act of taking water through the main canal and wasting it out through the waste-way rather than through the power plant deprived us of that much power. This decreased the output of the power plant.

THE COURT: In other words, more water was taken in at the point of diversion than was permitted to go on down through the canal?

A. Yes.

THE COURT: Did you object to that?

A. It decreased our power that much.

THE COURT: I say, did you object to that?

A. At that time? Yes sir. We called his attention to it at that time.

THE COURT: Did you ask him to lower the gates at the head, at the intake?

A. No, we didn't do that.

THE COURT: That is the only way you could keep the water out of the canal, isn't it?

A. Yes, If he didn't feel disposed to let that water go down the canal, he could have lowered the headgates and sent it down the river.

(Witness continues:)

We had two ditch riders read simultaneously the gauges above and below the waste-way, and by means of our rating curve we arrived at the amount which was wasted through the waste-way by the defendants during the period they were in possession of the government canal and headgates. It varied on different days. I have it here in tabulated form; it shows the amount wasted at the Barber waste-way by days from August 11th to October 3d. It really carries beyond October 3d, it carries it to the 12th, but Mr. Marsters released the gates on October 3d.

This statement was offered and admitted in evidence and marked Plaintiff's Exhibit "H".



MR. STOUTEMYER: If you had continued to receive the amount of water which you were taking from the river at the time that the possession of the government headworks was taken out of your hands by the defendants could you have continued to sell it at the rate which you were receiving for it?

MR. DAVIS: We object to that as incompetent, irrevelant and immaterial, and presuming that the taking was lawful.

THE COURT: You mean sell it for irrigation purposes?

MR. STOUTEMYER: Yes.

THE COURT: The objection will be overruled. You may cross-examine.

MR. DAVIS: Note an exception.  
(Witness continues:)

We have 1456 government water users renting water from us. They have no other source of supply. We were renting water at the time Mr. Marsters took possession of the gates. I have no doubt we could have continued to rent the water if we had been able to keep it.

*Cross Examination:* (Witness testifies:)

On July 11, 1913, 980.4 second feet of water were running in the government canal. This measurement was made just below the Barber wasteway, about a mile below the point of diversion. The locks that Mr. Marsters interferred with were at the point of diversion at the headgates. All our measurements in the main canal were taken at what we call gauge No. 2; that is a better station; the

stations up at the head of the canal we do not get good measurements on account of loss through the gates and one thing and another. Whenever I have spoken of water in the canal it was water passing this waste-way. We claim that the government had a right to all water in the river not taken by prior rights. I admit that there are prior filings on the river. On the 11th day of July, 1913, we had offered proof on 1647 second feet of water. This amount was not in the river available for us on July 11th; the amount available was 980.4 second feet. I do not remember just how we arrived at that, but we had been working in co-operation with the lower canals. I do not know just how we arrived at that particular amount. As I remember it, that was the amount that would give us water for our lands without any water whatever running into the Deer Flat Reservoir. We agreed to cut out, my recollection is, until there was no water being stored in the Deer Flat Reservoir. This was a kind of a tentative agreement. I talked it over with Mr. Stoutemyer, and I think I talked it over with other attorneys representing prior rights. In taking water from the river, we recognized priorities, but we did not recognize any amounts until the decree of the court. As project manager, my understanding was that the Stewart decree held us as to priorities but not as to amounts, that was my understanding. We did not determine the amounts which these priorities were entitled to though until we had an order of the court. We released everything from the canal system until



nothing was flowing into the Deer Flat Reservoir, and we kept the balance until Mr. Marsters interfered with the locks, or until there was some order of the court. On July 11th, we were actually delivering about 277 second feet to the New York Canal Company. We had a contract to deliver their water, and under that contract I think it has been ruled that up until the time there was some decree of the court we would deliver 277, and after there is a decree of the court we deliver 219; anyway, I know that part of the time we delivered 277 and part of the time 219. We wasn't carrying any water except for our own uses and the New York Canal. The transferred water to which I have referred was for our own purposes.

Q. How did you determine how much you were entitled to take for your own purposes under those transferred rights?

A. By agreement with the companies with which we had contracts. We had contracts with them, and I would call them up, and they would tell me how much I could take, and then I would talk with the Directors of their Districts, and possibly with the Water Commissioner, or his deputy, and I don't know just how it was arrived at, but it was under those contracts which we had with those companies.

Q. Now then, in view of all that, Mr. Bliss, I would like you to tell me just as simply as possible how you arrived at the amount of water which the United States was entitled to use on the 11th day of July, 1913.

A. We assumed that we was entitled to everything, without an order of the court, that is, up to a certain amount, that was agreed upon between these attorneys. I think they told me—in discussion with Mr. Stoutemyer—as to what we should keep and what we should let go.

(Witness continues:)

Mr. Stoutemyer told me to stop running water out of the river when there was no more running out of the Deer Flat Reservoir. We agreed to cut out everything in our canal until there was nothing flowing into the Deer Flat Reservoir, until we were not storing any more water, and when we reached that point we refused to cut out, and there was 980.4 left. We intended to continue taking that amount until the order of the court. We did not base this amount on anything. We just assumed there was no order of the court, that the Stewart decree stood as to priorities simply and did not carry any amount, and therefore until there was an order of the court, the Stewart decree was void as to amounts. 980.4 second feet delivered to the New York Canal Company what they required for their lands, and gave us what we required for our lands without any surplus running into the reservoir, that is, that was enough; when we had that we had what we required.

Q. In other words, you took what you required regardless of whether the prior appropriators had what they required or not?

A. We took this amount.

Q. And you say that is what you required?



A. That is what we required to properly irrigate our lands on the project, on the proposition that there was no order of the court then in effect.

Q. And until there was an order, you assumed you had a right to whatever you required for your lands?

A. Yes.

Q. But I thought you admitted that you recognized these prior rights, and I don't see how you recognized them and disregarded them at one and the same time.

A. I say we recognized them as to dates of priority; at least I have personally. As I understood the Stewart decree stood as to priorities, but not as to amounts. I have never recognized the Stewart decree as to amounts.

Q. Suppose, Mr. Bliss, that there were only 980.4 second feet in the river at that particular time, would you suppose you could take it all because you needed it all?

MR. STOUTEMYER: We object to that question because it is supposing facts that did not exist, and it is not material in this case.

THE COURT: You may answer.

A. I don't know what we would have done, of course, under that circumstance, but I was acting under the advice of my counsel in taking this amount of water.

(Witness continues:)

We did let a definite amount go down the river, but I do not know just how we arrived at that amount. We rather assumed that when the temporary order of the court would be given that it would be about what it was when it was finally given on July 18th, that is .6 of the Stewart decree, and we planned on letting that amount go down the river, taking into consideration the return flow. That is about the basis on which we worked. But even before this temporary order of the court was entered, those people having prior rights had, I think, a right to water before us. As I say, I recognized their priorities, I do not recognize any particular amount thereof. In turning out water for the New York Canal people, I think there has been a question for some time as to just what they were entitled to. We assume that they were entitled to what they were given in the Stewart decree. This was 219 second feet. We did not assume that all other people who had awards in the Stewart decree were entitled also to the amounts fixed in the Stewart decree equally with the New York people. We have a five years contract to transfer water with the Riverside Irrigation District. With reference to the amount of water we used under their right on July 11th, I think Mr. Lakin, deputy water master, arrived at that amount. I do not remember just how it was, but it was some of their rights under the Stewart decree. We also have a contract with the Pioneer Irrigation District to turn water out of the Deer Flat Reservoir and take a like amount out of the Boise River.



Q. And on the 14th and 15th day of July, 1913, you claimed 43 second feet from the Phyllis canal, did you?

A. Yes sir.

Q. And did you turn a like amount out of the Phyllis canal from the Deer Flat reservoir?

A. My recollection is that we did, yes sir.

Q. On what basis did you turn that out?

A. It was based on the same basis that we were entitled to a third of the water that they had been decreed under the Stewart decree, minus 20 second feet.

Q. Then you recognize the Stewart decree insofar as the Riverside Irrigation District was concerned, and the Pioneer Irrigation District?

A. We worked with the deputy watermaster, is my recollection, and he told us what we were entitled to.

Q. Then you recognize an inch to the acre so far as those two companies are concerned?

A. I don't know about an inch to the acre. I don't know what they were decreed under the Stewart decree.

Q. Then you recognized the Stewart decree as to the amount of water so far as those districts were concerned?

A. That is the amount we had in that canal.

Q. And that is what you took out from the Boise River?

A. Yes sir.

(Witness continues:)

In determining the loss to the United States that has been estimated at \$387.20, we found that Mr. Marsters, between July 11th at four P. M. and July 12th, cut out 1,488.8 second feet of water, and we found that we can deliver to the ground about 65 per cent of the water we take in the canal, so we take 65 per cent of 1,488.8 as the amount of water that could be delivered to the ground, and then multiply that by 40 cents an acre foot. That gives \$387.20, the amount of that water per day that he cut out. There were thirteen days between July 12th and 25th, and we took thirteen times \$387.20. This calculation is based upon the assumption that we were entitled to take out for each of those thirteen days the 980.4 second feet that we were taking out on July 11th. The river was falling more or less rapidly about that period and I don't know just what we were entitled to take until July 18th. On July 18th a temporary order of the court went into effect fixing the duty of water for prior rights at .6 of the Stewart decree. The amounts decreed to the rights prior to ours was about 2755 second feet, and on the 11th of July the natural flow in the Boise River was 2420 second feet. Without taking into consideration the return flow at points on the river below our diversion dam, the prior rights amounted on July 11th to 300 feet more than there was in the river. The return flow is in the river available for use the same as the natural flow, and so the total flow, I think would be there to distribute. On July 18th when the order of the court fixing



the duty of water for the remainder of the season went into effect there was approximately 1710 second feet of water in the Boise River above our diversion dam. This order fixed their rights prior to ours at some 1619 second feet.

Q. If there was 1710 feet in the river on July 18th, when this order went into effect, and prior rights were entitled to 1619 feet, then upon that basis you certainly were not entitled to 980.4 second feet, were you?

A. Not on that basis.

Q. What right have you to say you were damaged in the sum of \$387.20, or any other amount, unless you also state the basis on which you make that calculation?

A. I have made my calculation on three bases; one is, that Mr. Marsters didn't have any right at any time on government property, and another was that up to the time, he didn't have any right up to the time of the temporary order or decree, but would have a right after July 18th.

Q. But in making this calculation isn't it true that you assumed throughout that you were entitled to have the amount of water you were taking on July 11th?

A. That is on the assumption that he hadn't any right to take it out at all at any time.

Q. But you are trying to establish your right here; you are asking for damages. We are not defending. We are trying to make you prove your

right. We are trying to find the basis on which you assert a right.

A. I have told you the basis.

Q. You have told me?

A. Yes.

(Witness continues:)

Up to the capacity of the power plant all the water going down the river goes through the mill; anything over that goes over the dam. Mr. Marsters shut off 719.2 second feet from going into our canal and I presume a portion of that went through the power wheel. The average number of second feet that wasted back into the river below was I think about forty, and the action of Mr. Marsters undoubtedly increased the amount of water that went through the power plant and increased the power for the time being.

*Re-direct Examination:* (Witness testifies:)

Under this temporary order of the court which was made on the 18th of July, the amount of water to which the New York Canal Company was entitled was .6 of 219 or 131 second feet approximately. There was transferred or exchanged water in the canal between July 12th and July 18th. The amount of exchange water recognized and turned into the canal was determined by Mr. Lakin, acting under Mr. Marsters. We had no control of it. The 1619 second feet which was .6 of the amount of the Stewart decree included the decreed right of the New York Canal Company which was carried in the gov-



ernment ditch, and the amount to be turned below the government ditch would be less than 1619 because the New York right was taken out in the government ditch. Besides the normal flow of the Boise River as measured at Highland Station, there are a number of natural creeks—Indian Creek and Mason Creek and Wilson Creek and Middleton Slough and a number of sloughs coming into the river below the diversion dam bringing in a considerable amount of water. A large part of this comes into the river at points which make it available for supplying prior rights. There was no material difference in the amount of water required for irrigation between July 9th and July 18th of that year.

*Re-cross Examination:* (Witness testifies:)

It does not necessarily follow that because a duty of .6 of an inch late in the season is fixed as sufficient that prior to that time this would be the proper duty of water.

Vernon H. Tregaskis being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

*Direct Examination:* (Witness testifies:)

I went to work for Mr. Marsters either the afternoon of July 11th or the afternoon of July 12th, 1913, and I continued in his employ for twelve days, I believe it was. I was employed as a guard at the diversion dam for the headgates; I was part of the time at the waste-gates and part of the time at the headgates.

I was acting indirectly through Mr. Marsters. He had a man there by the name of Ed somebody that acted as a kind of foreman over us while we was there—that is, he attended to the regulating of the water. I got orders mostly from Mr. Marsters, and was employed to watch the headgate and to keep anybody from molesting headgates, raising or lowering them, except by the orders of Mr. Marsters. The original change in the gates had been made before I went up there. We stayed principally in the blacksmith's shop at the edge of the dam, and I slept a number of nights down below the waste-gates where the weir is. We used the government blacksmith shop for cooking purposes, and we utilized the forge in lieu of a stove. There was a tool shed at one end of the shop, and if the weather was bad we slept in that; otherwise we took turn about sleeping. There was a bench outside the blacksmith shop that we slept on. I carried arms when I went to work there.

Defendants admit that they took possession of locks and cut the locks which were there, and controlled and operated the gates and controlled the water until some time in October.

Harold Conklin, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct Examination:* (Witness testifies:)

I am a civil engineer employed with the Reclamation Service, and in the summer of 1911 I was at the Boise office. I am familiar with what is known as the government power plant located at the diversion



dam on the Boise project. I can determine the amount of power that can be created at that plant by a given volume of water going through it. The maximum capacity of the plant is 2,000 kilowatts. 1260 second feet of water are required to develop the maximum capacity of the plant.

Here witness identified a certain paper which purported to show the loss of power caused by interference with the regular flow of the Boise River in August, September and October, 1913. This paper was offered and admitted in evidence and marked Plaintiff's Exhibit "I."

(Witness continues:)

If Exhibit "H" is a correct statement of the water which was wasted through the waste-way of the government canal under the charge of defendants, then if this additional water had been allowed to flow down the river instead of being taken into the canal and carried around the power plant, there would have been 20,160 kilowatt hours of additional power developed. In September, there would have been 15,888 additional, and in October 984. I have in my possession a copy of the contract between the United States and the Idaho Oregon Company for the sale of power, and under the rates agreed upon in that contract, the additional power which may have been developed could have been sold for the sum of \$259.22.

*Cross Examination:* (Witness testifies:)

The first date that this calculation I have made begins on is the 11th of August; that is the date on

which I understood the headgates were first regulated by the water master. On that date 966 second feet passed the government canal and went on down the river. 991 second feet would have gone through if there had been no water wasting through the waste gates. My estimate of the power developed on that day and the power which was lost is based upon the difference between those two amounts. The loss on that day was 33 kilowatts. I made a similar calculation for the next day. I believe the Idaho Oregon Company was under no obligation to take this power under its contract.

Here plaintiff offered in evidence Exhibit "J," a copy of the contract with the Idaho Oregon Company above referred to.

(Witness continues:)

I was not in charge of the power plant during 1913. My duties had nothing to do with this power plant. The only thing I did was to make an expert calculation of what might have happened supposing these other tables that were offered in evidence are correct.

Austin D. Price, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct Examination:* (Witness testifies:)

I am an engineer in the employ of the Reclamation Service in charge of the work of the hydrographic branch of the project, measuring the flow of water in the various canals and also in the Boise



River. I have been engaged as engineer in the measuring of water for a little over five years. In the summer of 1913, I was working for the Reclamation Service in Boise in charge of measurements on the government main canal at the power plant; I also measured the Boise River at the various stations. I made measurements at the station at Highland on the Boise River and measurements on the main canal both above and below the wasteway. I made these measurements during the season of 1913 after July 11th. I did not make any measurements showing the amount of water flowing through the government power plant at the government diversion dam, simply the river and main canal. The amount of water flowing through the power plant was determined by measuring the river at Highland and measuring the canal and determining, of course, whether or not there was any water being wasted over the spillway at the power plant. With no water over the spillway, the difference between the amount in the river above the dam and the amount in the canal would give the amount going through the power plant. I made all the measurements shown in Plaintiff's Exhibit "H" of water being wasted out of the wasteway on the main canal.

*Cross Examinations* (Witness testifies:)

The Highland station is about seven or eight miles—possibly six or seven—above the diversion dam. When I measured the water running in the government canal, I made measurements both above and below the Barber waste-way; about 300 feet below and

about half a mile above. We have regular measuring stations at those points. The measuring station about half a mile above the waste-way is designated as M. C. 1, and, of course, if there was no water wasting out of the Barber waste-way 1 would give the discharge. When water was wasting out of this waste-way M. C. 2 will give the correct discharge the canal is carrying, and No. 2 is used merely sometimes for what the canal is carrying below the waste-way. In 1913 No. 2 was used for determining the capacity the canal was carrying for delivery to the lands. I had nothing to do with controlling the amount of water going into the canal. I simply measured it. I happened to make the measurements of the water wasting from the main canal in 1913 because that is my regular work measuring M. C. 1 and M. C. 2, and the difference between these two measurements gives you the amount of water going out of the waste-way. The amount wasting out varied from about 21 acre feet to 160 acre feet per day. I only saw Mr. Marsters or the men under him raise or lower the gates once and that was on the 12th of July. The figures prepared by me were used for the purpose of computing the power development and the loss of power by reason of the water which did not pass through the turbines. Every time I had occasion to visit the power plant, there was no water going over the crest of the dam. It was all going through the turbines. The tables show the last date on which this loss occurred as October 12th. It has been testified that Mr. Marsters and his men relin-



quished control over the canal on October 3rd. I know nothing about the loss which occurred between October 3rd and October 12th; I simply prepared my table covering my year's work and they used whatever part of it they saw fit. I had nothing to do with the application of the table I prepared at all.

C. C. Bennett, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct Examination:* (Witness testifies:)

I have been working for the Reclamation Service for about three years and was employed as a watchman on the New York Canal in 1913, that is the same canal referred to as the government main canal. While so employed I saw the men under Marsters operate the waste-gates on the main canal wasting through the Barber pond. I saw this most every day. Some days they would not operate them, but most generally every day. They put locks on the gates after they would run them up or down. I took readings on the gauge below the waste-way three times a day—once in the morning, once in the afternoon and once in the evening. I turned these in to Mr. Healey on a report card which came to the Boise office.

Guy Healey, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

*Direct Examination:* (Witness testifies:)

During 1913 I was employed by the United States Reclamation Service as ditch rider on the New York

canal. While so employed I saw Mr. Marsters or the men under him regulate gates; it was just a case of running them either up or down, and they put locks on the gates. I took readings for the purpose of determining the amount of water running out of the waste-way. I took such readings generally twice a day, both above and below the waste-way. The reports of these readings were sent to George H. Bliss, reclamation manager.

*Cross Examination:* (Witness testifies:)

I took the readings below the waste-way twice a day and once a day above. There might have been a few times that I failed on the upper reading M. C. 1, but I think most of the time, every day. The most of the times that I saw the representatives of Mr. Marsters regulating the gates was somewhere in the neighborhood of the 12th or 15th up until some time in August, or perhaps the latter part of August.

A. V. Tallman, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

*Direct Examination:* (Witness testifies:)

I am a civil engineer, specialized in water troubles. I have specialized in the measurement of water since the spring of 1910. This year, beginning the first of April, I have had charge of the Boise River as a special deputy from the State Engineer's office. In this capacity I have made an investigation of the amount of return flow coming into Boise River below the government diversion dam. Last year, on the 9th of July, we made complete seepage measurements, or



complete measurements on all the canals on the Boise River, and also measured all tributaries to the Boise River coming in below the government dam to determine what was tributary gain, and what was seepage gain, and on that date we found, if I remember right, 827 second feet of return flow that could be distributed over again.

Q. What effect did that have upon the amount of water which it was necessary to turn down below the government diversion dam to supply the rights decreed under the temporary order of the court?

A. Last season—

MR. DAVIS: We object to that, if your Honor please, on the ground that it is incompetent.

THE COURT: Unless you promise to show that conditions were the same the previous season as they were last season, of course this testimony would be wholly incompetent.

MR. STOUTEMYER: I think we can show that they were approximately the same.

THE COURT: Very well. On that promise the objection will be overruled.

(Witness continues:)

It made it possible to reduce the supply necessary to let down the river; by watching the lower end of the river and utilizing all this return flow along the latter part of June, I was able to dry the river up a mile below Star, the Canyon County Canal, and I maintained that point as being the end of the river practically the rest of the season, and there was suf-

ficient water below there to take care of all the lower rights, and that made it possible to maintain water, the old New York stock right, which is supposed to be a rather poor right on the river, made it possible to keep water on that right up until I think it was the 30th or 31st of July. Last year was a rather unusual low water year. On an average, for July, of a .6 basis, it would take between 900 and 1000 second feet to supply .6 of the Stewart decree to the rights. Figuring on the basis that my average return flow for the month of July would be 600 second feet, last year in July the return flow decreased as the season advanced, due to the fact that the canals were taking in less water all the time, the river supply was decreasing all the time, and that materially affects the return flow. This would average 600 feet in July. I have been keeping measurements on the canals in the Boise valley; my water masters have read the gauge every day, and I have a system of co-operation through which I exchange these gauge readings with Mr. Stewart of the Reclamation Service, and he has two men measuring these canals. I have been mixed up with these canals so long that I know just about when they get to the limit. I know pretty closely the amount of water they take when they are taking all they want.

The latter part of August (1914), about the 15th of August, the water reached the lowest stage in the Boise River, about 700 second feet at Highland, and it held constant through the month, and the latter part we found the return flow was down to about 425



feet. We made a couple of measurements early in the month of August, and I think the return flow was between 500 and 600 feet, and I should judge the average for August is about 500 second feet of return flow. At this time of the year, there are no tributaries. The return flow for September (1914) averaged about 425 feet the first fifteen days, and I think it was on the 17th of September that we got a rather heavy rain that upset everything that we had outlined from that time on. I called my water masters off at that time. I could not say how the season of 1914 and the season of 1913 compared as to climatic conditions. I couldn't testify to any difference in the rainfall or other conditions.

*Cross Examination:* (Witness testifies:)

These measurements that I spoke of were made during the season of 1914 only. There is considerable variation in the water in different streams in different years. In order to get any figure which could be taken as an average for a year for any given time, you would have to take measurements over a series of years and then the average might play you a trick. It would all depend upon the comparison between the seasonable demands, seasonal conditions whether the statements with reference to 1914 may have been very far from accurate with reference to 1913. Our conditions at the present time are far from what they have ever been. Different from any year I have heard of or any records I can find. About the first of May this year, the Boise River was lower than it was on the first of July last year. The fact

that the Arrowrock Dam has been constructed to a point where it will hold water, and that water is being stored there, has now and for this season generally something to do with the amount coming down.

*Re-direct Examination:* (Witness testifies:)

Under the present conditions in regard to the demand of the ditches below the government diversion dam, in my estimation the present demand is unusually large. I have never known them to require a larger amount than they are taking now. The maximum in all the time I have been on the river is about 1800 second feet. With reference to the return flow, these drains that have been constructed around Caldwell are developing a good deal of it, and Indian Creek, and pick up waste water from the Ridenbaugh canal. These drains were constructed in the last two or three years. I could not say whether any of them were in existence in 1913. All of these sloughs carried a good deal of water. The Middleton slough at Middleton picks up water from those three Middleton canals, and Ten Mile and Five Mile Creeks all pick up seepage water. What I classify as waste water is water that is wasted by each farmer tributary to these sloughs, and there is always a certain percentage of waste water from each farm, and that gradually accumulates until it develops a considerable stream, and there is always some seepage water right around that country around Caldwell. The return flow that can be measured comes from Indian Creek, Mason Creek, Mason Drain, Caldwell Drain, Ten Mile Creek and Middleton Mill Slough, and there is



the Boise sewer, and there are several little wastes—there is the Phyllis waste, the Thomas slough—there are a number like that that we kept track of all the time. I have to determine just what they are carrying every day so that I will know how to handle my water. Last year we measured the Boise sewer, and at different times it was carrying as high as 22 second feet of water where it runs into the river.

*Re-cross Examination:* (Witness testifies:)

I am acquainted with the canal owned by the Farmers' Co-operative Company. Its capacity is about 250 second feet. They were diverting yesterday a little over 100 second feet. Today they are diverting 160 second feet. I am acquainted with the canal owned by the Middleton Mill District. They were diverting yesterday 80 some second feet. They are carrying today about 100—they are carrying very close to 115 second feet. The Farmers' Co-operative Canal is carrying today about 160. The capacity of the Riverside Irrigation District Canal is about 220 or 225 feet. They were short yesterday. I didn't get that report. I know the canal known as the Sidenburg Canal. I have not got my rating curve with me, or I could tell you correctly its capacity. They are diverting their canal full today. The Sebris Canal people were demanding more water yesterday. I suppose they could carry it if I could turn it down to them. The difference between what the Sebris Canal was carrying yesterday and its capacity is 90 second feet. The capacity of the Farmers Co-operative Canal is 250 second feet, and they are carrying

today 160 second feet. They are carrying one five on their gauge, which gives them exactly 202 second feet, is what the Sebris canal is carrying today. I wish to correct that statement; I got mixed up a little bit.

George H. Bliss, being recalled as a witness for further cross-examination, testified as follows:

*Cross-examination:* (Witness testifies:)

Before Mr. Marsters went up there and took water, he asked me to cut out 400 second feet. I declined to do that. I do not remember a conversation with Mr. Marsters in regard to the waste-gates in which I asked him to regulate the flow of water at the point of diversion rather than at the waste-gate. I remember that I called Mr. Marsters' attention to the fact that he was wasting water at the waste-gate. I don't remember what he told me in reference to that. I don't remember a conversation in which he told me one of the headgates did not close and that he couldn't stop the water off at the waste-gates, that he would regulate it at the point of diversion if I would fix this waste-gate so that it could be closed. I do not remember. I had some conversation about the water wasting there, but I don't recall his telling me he would regulate it. I remember that one of the gates leaked some water. This could have been regulated at the headgate and water enough turned off to offset the leakage. He could have controlled it at the headgate just as rapidly as he could at the waste-gate by raising the headgate more to overcome the amount that leaked under the waste-gate. Defend-



ants regulated the water by lowering and raising the waste-gates instead of by lowering and raising the headgates.

O. G. F. Markhus, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

*Direct Examination:* (Witness testifies:)

I am receiver of the Idaho Railway, Light & Power Company. In the summer of 1913, I was general manager of the Idaho Oregon Light & Power Company and of the Idaho Railway, Light & Power Company; at the time this company was buying power from the United States. This power was generated at the diversion dam plant. It was tied into our system at our Barber power plant and was so adjusted that the surplus power from that plant would turn automatically into our system. We are paying for that power at the rate named in the contract between our company and the United States, and we were taking all the power that we could get from the United States at that time. We would have taken more power from the United States if we could have received it. I could not give you the exact amount we would have taken. It would be a considerable amount for the reason that the Idaho Oregon Company was buying first from its parent company, the Idaho Railway, Light & Power Company, owned by the same people; second, from the United States from the diversion dam, with whom we had a contract, and any surplus needed from the old Beaver River Company. We would have taken 984 kilowatt hours in addition to what was available covering the whole period, if

we could have received it. Our company would have taken the additional power which would have been available from the government plant, if there had been an additional amount of water flowing through the power plant of not to exceed 37 second feet.

*Cross Examination:*

Witness was shown and identified a copy of the contract entered into between his company and the United States Reclamation Service.

(Witness testifies:)

Under this contract, the government has a right to use all of the power that it develops. We had no vested right in any power there at any time. It all depends on whether or not there is any surplus after they have used all they want for other purposes. We felt that a consideration of the rate was that we take all the surplus that the government had as surplus above their own needs, and that we were under obligations to take that surplus, and that is the reason why the government surplus came in second after the Idaho Railway, Light & Power Company surplus as referring to the needs of the Idaho Oregon Company and the additional power required above those two sources would then be taken from the old Beaver River Company. The rate from the United States is lower than the Beaver River Company, and it would be to our advantage to take it from the government first.

Edwin Healey, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:



*Direct Examination:* (Witness testifies:)

I am water master for the Reclamation Service, and was so employed in the summer of 1913 on the main canal, the upper section. I observed the waste-gates which empty into the Barber pond prior to the time that Mr. Marsters and his assistants took possession of the canal heading. Those gates were tight and in good condition prior to the time that Mr. Marsters and his men began operating them. I do not believe they were injured much at that time. They seemed to have leaked more after Mr. Evans up there was operating them. Evans was one of Marsters' men. They seemed to leak more after he operated them. The cause, I suppose, was not letting them down properly. They were very heavy gates, and should be handled very carefully. They are made out of concrete partly, and it is necessary to operate them very carefully to avoid springing them. It was not necessary to regulate those gates at all to regulate the flow of the main government canal. I do not regulate the canal that way.

Guy Healey, a witness heretofore sworn on behalf of plaintiff, was recalled for further examination and testified as follows:

*Direct Examination:* (Witness testifies:)

I observed the waste-gates on the government main canal where they empty into the Barber pond, a short distance below the government headgates, prior to the time that Mr. Marsters and his assistants took possession of them and began regulating them. It was my duty to make observations of such things

each day, and in fact I went past the waste-gates twice a day. The gates were tight and in good condition prior to the time that Marsters and his assistants took charge of them. It was not necessary in regulating the main canal to operate those gates. I did not regulate the canal in that way when I was in charge of it.

*Cross Examination:* (Witness testifies:)

I was in the court room yesterday and heard Mr. Bliss state that one of these gates was out of order and leaked. The gates, I believe, there is one gate that is subject to leaking a slight bit.

Q. And that was leaking before Mr. Marsters took control, was it?

A. I believe not.

Q. When did it start to leak?

A. After the gates had been operated.

Q. Were you up there the day that Mr. Marsters first took control of this diversion of the water there?

A. I was.

Q. Didn't you notice on that day that it was impossible to stop all the waste that was running through that one gate?

A. Yes, to stop all of it, yes sir.

Q. Then, some did run through there at that time?

A. Very, very little.

Q. Then that didn't start after Marsters came there?

A. It did.



Q. I thought you just said it was running there at the time and they were unable to stop it.

A. Very slightly.

Q. But there was some running through there, was there not?

A. A slight bit, yes sir.

MR. DAVIS: That is all.

*Re-direct Examination:* By

MR. STOUTEMYER:

Q. Was there any material amount running through there?

A. No sir.

Q. Merely a little seepage?

A. A slight bit, yes sir.

Q. More or less than a second foot?

A. I presume there was that much, possibly a little more.

Q. Is it your judgment that it was about a second foot, or a little more?

A. I presume there was a little more than that.

Q. What amount would you say?

A. I would say in the neighborhood probably of from one to three second feet, somewhere around there.

MR. STOUTEMYER: That is all.

*Re-cross Examination:* By

MR. DAVIS:

Q. Three second feet of water is some stream, isn't it, Mr. Healey?

A. Yes, it is some little water.

MR. DAVIS: That is all.

W. G. Stewart, being called and duly sworn as a witness on behalf of plaintiff, testifies as follows:

*Direct Examination:* (Witness testifies:)

I am assistant engineer in the Reclamation Service. I have been investigating the duty of water, hydrographic work, and the duty of water on the Boise project. I have been so engaged since March, 1909. I have made measurements and investigations to determine the amount of water diverted by the various canals on the Boise River and the amount of return flow in the Boise River. I have made measurements and determinations as to the return flow from seepage and return flow from tributary gains. I have here a chart of Boise River. It is diagrammatical. It is approximately correct as to the distance for the diversions, but not accurately. It gives the average of the diversions and tributary flow for a period of thirty-four days from August 8th to September 10, 1914, but in a diagrammatic form which was to give an idea of the whole situation of the Boise River from the diversion dam to Notus, a point about eight miles below Caldwell. This is correct as to the relative location of the various canals diverting water and the various streams contributing return flow.

This diagram was received and offered in evidence and marked Plaintiff's Exhibit "K."

MR. DAVIS: We object to the admission of this in evidence, since, as stated by the witness, it was pre-



pared in the latter part of 1914, and therefore can throw no possible light upon conditions existing in the summer of 1913.

MR. STOUTEMYER: It is offered with the understanding that it is offered for the purpose of showing the locations of these tributaries and of the canals, relative locations, and also for the purpose of showing that the conditions were similar in 1913 to what they were in 1914.

MR. DAVIS: I object to it on the further ground, because the witness himself has admitted that it is not accurate as to locations, but only approximate and as to quantities flowing we renew our objection.

MR. STOUTEMYER: It shows accurately the relative locations as to what canals can be supplied from the portion.

MR. DAVIS: And as to the amounts flowing, we object to that on the ground that it affords no basis for any judgment as to what the condition was in 1913.

THE COURT: Sustained as to the latter purpose. Overruled as to the former.

(Witness continues:)

I made measurements and investigation on the flow of water in the Boise River in the years 1913 and 1914. The flow in 1913 was considerably more than in 1914 for the months of May, June, July and August. In 1913, in May, the average discharge of Boise River was 9250 second feet. This was at Highland. In 1914 it was 8930. In June, 1913, it was

6890. In 1914 it was 5130. In July, 1913, it was 2560. In 1914 it was 2000. In August it was 1340, in 1913, and in 1914 it was 947. The additional flow in 1913 over 1914 had a tendency to increase the return flow because it gives the canals a greater use of water during the irrigation season, and whenever you increase the quantity of water delivered to the canals, you invariably increase the return flow of Boise River on account of the increase in tributary flow. Usually the largest tributary coming into the Boise River below the government diversion dam is Indian Creek. This creek has the largest flow in July. I kept measurements on the amount of water flowing in that tributary in the year 1913, and also in the year 1914. In 1913, in the month of July it had the largest flow in Indian Creek. I have prepared or made measurements and kept records showing the relations between the amount of return flow and the amount of water being diverted by the canals. This is in hydrographic form so as to show in a diagram the relation of the flow of Boise River, the tributary water, the seepage water, and the deliveries to the canals, put in hydrograph by days. This was 1914, from July 9th to September 16, 1914. The lower line represents the discharge of Boise River for 1914. The second line is the added amount which comes in from tributary flow. The line above that shows the seepage, and the line above that the water that is delivered to canals, so that the intermediate spaces will indicate the amounts of water in each case. We make



measurements of Boise River, and we keep a continuous record of Boise River from day to day, and we have a continuous record of the discharge of the canals, all of the canals, that is the canals that take water out of the river from day to day. We have a continuous record from day to day of all the tributaries along the Boise River from Highland clear down to Parma. We have done more or less of that work for four or five years. I have measurements and investigations for determining the relations from day to day between the amounts being diverted and the amounts coming in as return flow. On previous years, on a number of different days, we have made single measurements the whole length of the river, taken the measurement at Highland, and then have gone and made a measurement of all the canals and tributaries along the river, and summed them up, just as I told you, for the particular day, and in that way we found out the relation between the tributary and seepage flow as compared with the flow of the river. Last season we undertook to carry on day by day, so as to show for the entire low water period that tributary and seepage flow was most essential to the irrigation needs of the valley. We wanted to know what that relation was, the relation to the flow of the Boise River, and how it acted in relation to irrigation, and kept that up for the whole season day by day, and put men on for that special purpose, to investigate that, kept that up continuously, and I have that plotted in a diagram which is the one that Mr. Stoutemyer refers to, and that diagram shows

that whenever the river increased the canals took that discharge into their heads, it was used—it was in the low water period, and whenever they took that in there was an increase in the return flow in the next two or three days. It didn't come the same day, but it would follow. We get an increase at Highland and the increase will come a day or two later, and the increase return flow will come maybe two days later than that, so there is a continuous lag on that wave that comes down the river, and that is shown in this hydrograph very distinctly.

In 1913 we didn't make very close investigation along the river. Our principal investigation in that connection was mostly on the project. We did keep a record of Indian Creek, but nothing extensive. In 1911 and 1912, we had quite complete records, but it so happened that in 1913 we haven't complete records. In 1912, we have records that indicate the same thing that we have here. We had continuous records in 1912 on a number of important tributaries, and the tributary flow is practically the same in 1912 that it was in 1914. The flow of the river was, I think, a little bigger in 1914 than in 1912. It was higher in 1913 the early part of the season. I think it was higher in 1912 than in 1913 during the irrigation season. I think it was. During the period in consideration, July and August in 1912, the water was considerably higher than in either 1913 or 1914. I have not the return flow complete for 1913; the return flow was approximately the same so far as we have it, on the important tribu-



taries, like Indian Creek and Middleton Mill slough, and Ballentyne and those creeks. That return flow is very constant so far as we have been able to observe. It was more in July, 1913, than it was in 1914. I attribute that to the fact that the river had more water and they used more; that is, it was available to them at that part of the year.

THE COURT: How do you account for the fact that in 1912 you had more water than in either year? You said the return flow was about the same.

A. When I say about the same, it may have been a little more, but as near as we can get at it it was approximately—

THE COURT: It may have been a little less?

A. Yes—Well, in 1912, it might have been a little less; yes, though they had more water. That return flow is very nearly—

THE COURT: You may put this in afterwards, Mr. Stoutemyer, but I shall consider it of practically no value unless it is accompanied with that of other years. I will say very frankly to you that I haven't very much patience with inferences drawn from single experiments. They are just as apt to be misleading as not.

MR. STOUTEMYER: This diagram is offered as plaintiff's exhibit "L."

Said diagram was thereupon marked Plaintiff's Exhibit "L."

MR. DAVIS: We renew our objection pro forma.

THE COURT: Overruled.

MR. DAVIS: Note an exception.

(Witness continues:)

We had records of Indian Creek, Middleton Mill slough, Ballentyne and Boise Valley No. 2 wasteways for 1911 and 1912. These measurements were practically the same as similar measurements during July and August, 1914. The return flow was practically the same so far as it was measured. In 1911 and 1912, I made a very extensive series of experiments as to the duty of water and the amounts of water being diverted by the various canals of the Boise River. This is the fifth season that I have been making experiments as to the duty of water. On the duty of water at the headgates, we covered about a little over 130,000 acres, experiments on the duty of water at the headgates in the Boise Valley. And on the duty of water at the farm in the valley itself I carried on one series of about 130 acres, and on the Boise project we had a number of experiments covering probably 200 acres. This measurement includes approximately eighty-five per cent of all the lands watered by the old rights in the Boise valley.

Q. Is there any material difference in the amount of water required for irrigation between July 11th and July 18th?

A. No sir.

Q. What amount of water—

MR. DAVIS: We desire to enter an objection at this point to this line of examination for the reason that if this suit has for its purpose the fixing of the duty of water as against the older appropriators on



this stream, the proceedings are defective, in that those appropriators have not been made parties defendant, and are not in court, in order to defend their rights.

THE COURT: Overruled.

MR. DAVIS: An exception.

(Witness continues:)

In order to supply all the old canals below the government diversion dam with .6 of the Stewart decree requires between 900 and 1000 second feet, approximately 950 second feet. It would vary slightly from day to day. In 1914, the average return flow from July 9th to July 31st, from the diversion dam to Notus, was 465 second feet. From Notus to Parma, it was 86 second feet, making 551 as the average return flow obtained for July. With reference to the difference between the duty of water in the season of 1912 and 1913, I didn't keep any careful record of the weather. The irrigation needs were practically the same. I didn't keep any careful record. On or about the time that the water master broke the locks on the government gates I made measurements of the canals on the Boise River. I made these on July 11, 1913. This was prior to the time that it was affected by the water turned out of the government canal. I found the Boise Canal diverting 41.83 second feet. This is more than the Stewart decree, which was 38.1 second feet. The Farmers Union Canal was diverting 187.5 second feet. The Stewart decree in that case is 164.58 second feet. The Middleton Mill ditch was diverting 73.79 second feet. The Stewart decree

was 64.9 second feet. The Phyllis Canal was diverting 322 second feet. The Stewart decree is 309.44 second feet. The Pioneer ditch was diverting 29.96 second feet. The Stewart decree is 25.72 second feet. These measurements were started early in the morning and completed in the afternoon. These measurements were all taken before the river was affected by the cut at the diversion dam.

*Cross Examination:* (Witness testifies:)

Mr. Bliss, the project manager, ordered me to make these measurements. I did not make them all myself. They were made under my supervision. I made a good many of them myself. I did not measure all the canals diverting water from Boise River on that day. The Riverside canal on that day was taking from the river 78.66 second feet. They had a supplemental supply of 44.41 feet from the Indian Creek canal, giving a total of 123.07 second feet. The decree of the Riverside was 206. They were carrying 123. The difference represents the amount which they had under their decree. The Riverside people were short in their decreed rights approximately 83 second feet. There were a number of other canals short on that same day. The canals I have named were the ones that we measured that had over their amount. I didn't say anything about the canals drawing much less than their right under the Stewart decree. The aggregate of the discharge of the canals measured was 1639 second feet, and the aggregate of the Stewart decree for these rights was 2133, or 77 per cent of the Stewart decree. Including the



old New York right, there were 403 second feet of the small canals that we didn't measure. I don't know whether they had all the water they were entitled to or not. The statement shows the difference between 1639 and 2133 second feet which these canals were taking less than their decreed rights under the Stewart decree. On a large canal, I don't regard a difference of two or three second feet as very material. We don't figure right down to the last item. The measurements are according to my estimate the most accurate that the science of hydrography can give. Measurements may vary. There is more or less fluctuation on the river always. We cannot segregate rainfall from other return flow. In cases where we know there is a heavy rain and there is a peak in return flow, we make a note of that as rain or something of that kind in the remarks, but to segregate the runoff from rain from the runoff from irrigation, we cannot segregate that very closely. In any of the measurements I have given, I believe I have made no allowance for rainfall.

*Re-direct Examination:* (Witness testifies:)

The canals that were diverting less than the Stewart decree on July, 1913, were scattered all along the river. There was water in the river available for all these canals down as far as the Canyon, and with the exception of the Farmers Co-operative and Riverside, there was water for all those below the Canyon. The Riverside and Farmers Co-operative could not have taken their full supply.

Q. "Do you know whether the capacity of any of these canals were less than the Stewart decree?"

A. "Yes, the capacity of some are less. Capacity of Ridenbaugh is approximately 400 second feet. The Stewart decree for this is 540 second feet. Stewart decree for Jacob's canal is 20 second feet and a fraction. The capacity with water running over the banks is between 8 and 10 second feet."

The Boise Valley No. 2, the return flow of Boise Valley to the river, Ballentyne waste, the Middleton Mill slough and Indian Creek—these four wastes, I have complete records of for the years 1911, 1912 and 1914. The total return flow for the months of July, August and September for these four return flows, for 1911 was 19,339 acre feet. In 1911 it was 21,722 acre feet. The measurements on Indian Creek for the two years of 1911 and 1912 are included in this. In 1912, the flow of Indian Creek was 2764 acre feet. July 1912, it was 2484 second feet. In July 1913, it was 6575 second feet. In 1914, it was 4634 second feet. In August 1913, it went down to 2700. The return for July 1913 was larger than any other year. I can give the monthly returns for 1911, 1912 and 1913. The discharge of these waste-ways for July 1911 was 9478 acre feet. In 1912, it was 6844 acre feet. In 1914, it was 8244 acre feet. *Cross Examination:* (Witness testifies:)

In July 1913, there was a very heavy rain. The return flow was probably affected by this condition. The rain was in the latter part of July. It was somewhere about the 24th or 25th.



*Redirect Examination:* (Witness testifies:)

Between the diversion dam and Notus, we got a return flow of 200 second feet, but we did not get the return flow that occurred below, that is, between Notus and Parma, which is taken into consideration in these canal rights. I think it was as low as 190 at the low water period at one time, but taking the rest of the return flow, I don't think that it was ever less than 200, that we have ever measured. I believe the comparison of the return flow as shown by these five channels is representative of the return flow as a whole.

ELIAS MARSTERS being called and duly sworn as a witness on behalf of the defendant with reference to the return flow at the time in question, testified as follows:

*Direct Examination:* (Witness testifies:)

I was a water commissioner of the State of Idaho in July 1913. The duties of my office involved the control and distribution of the waters of Boise River. That included the distribution of all the canals and laterals leading out of the Boise River from the highest point where there was any diversion to the lowest. I assumed control of the entire river. I have heard the evidence that has lately been given with reference to the question of the return flow to the Boise River. I understand what that means, sure. With two assistants from the State Engineer's office, I went down and measured the water, measured it several times in 1913, all the return flow. There had been—It had been suggested to us by some of the

ditches below that they weren't getting what water they were entitled to, and myself and two men from the State Engineer's office went down and measured these ditches, and measured the return flow, and we found we were short about 404 second feet, according to their estimates of the amount, to fill the Stewart decree, and they made a demand on me to take this water from the government, that they had 404 second feet more water that they were entitled to. I called up Mr. Bliss—in fact, I never met the gentleman until in court here yesterday; all our work was done over the telephone, and by correspondence—and I asked him for half of this water, and he wanted to know under what authority I was asking, and I said, "As State Water Commissioner," and he said, "What decree are you working under?" and I said, "The Stewart decree." And he said to me, "Don't you know that the Stewart decree is no longer in effect?" And I said, "No, I didn't know it," and he said, "You had better proceed to post yourself," and I said, "Sure, I will," and then is when I went to the Attorney General's office for advice, and they advised me what to do, and instructed me what to do, which I did do on the 11th.

Q. Was there any water wasting into Snake River on July 11, 1913?

A. There were.

Q. What was the nature of that and what was its amount?

A. Well, it wasn't but a very little. The head-gates at the lower center point had been fastened



down as tight as we could get them, and there was no water practically below the river at the lower center point canal. That was the last canal we had charge of on the river. There was a few other little canals that picked up waste water, that we never paid very much attention to, but I wouldn't say whether it was just before this or a few days after—that we measured the water at the Parma bridge, the men sent out by Mr. Wing and Mr. King of the State Engineer's office, to measure this water in all these canals, and we found, if I remember right, something like 77 second feet going under the Parma bridge at that time. That was five or six miles below the last canal.

Q. But at the last canal did you state that all the water was turned out?

A. Every bit of it.

Q. Coming up the river from the last canal, was there more water going into any canal, or to any water users' ditch, than they were entitled to?

A. Not according to my understanding, not according to the reports of watermasters on the river, there weren't.

Q. And that condition continued, did it, right up to the—

A. Right up to the diversion dam.

Q. The diversion dam?

A. Yes sir.

Q. In that way did you make allowance for all the water that got into the river, whether it came

from above the diversion dam or whether it came from any of the laterals or diversions below?

A. There wasn't any water coming in above the diversion dam below Highland. We got our readings from the Government of the amount of water in the river at Highland, and it never was considered that there was any waste or seepage to amount to anything between Highland and the diversion dam.

Q. Your distribution included all this water that came down the river to the diversion dam, plus all the water that came in below?

A. Yes sir.

Q. Under those circumstances all the water that came in was 404 second feet?

A. Yes sir.

Q. And you made demand on the government for that amount?

A. I made demand on Mr. Bliss for just half that amount, and he refused.

Q. What was your idea for making demand for just half?

A. Because the watermasters and ditch companies thought we could get along and let the government have that water for a few days longer, if it was possible to do so.

*Cross Examination:* (Witness testifies:)

I have been a farmer all my life and an auctioneer. I have been employed as water master in 1913 since the first day of April. I don't pretend to know how



to measure water flowing in a canal. I couldn't tell what number of second feet were flowing in a canal of certain capacity. These statements which I made with regard to the amount of water, I depended entirely upon what others from the State Engineer's department told me. I went with them when the measurements were made. Once or twice we measured every ditch on the river, and also measured the river at Highland. I think we measured the river at Highland three or four different times. I don't think we measured all the streams just prior to the time the locks on the government headgate were broken. We measured the Phyllis canal. We measured the Farmers Union canal; the Boise City canal; I think the Pioneer canal; the old Sebris canal and the Riverside. The amount these parties claimed they needed was 404 second feet to fill the decree, the Stewart decree of an inch per acre,—that is 2755 second feet. The water master reported to me that they could get along for a few days with half that amount and allow the government to have half of it for a few days longer. We were changing the canals and lowering them at that time, all of them; practically every day or two we would take a little slice out of different canals where they would lose their rights, where they were carrying a little more than their rights, I should say. By their rights, I mean their decreed rights under the Stewart decree. I heard it had been reversed by the Supreme Court as to the duty of water, but I know they had always worked under that part of it up until they got the temporary decree.

We measured Indian Creek, Mason slough—three or four that run into the river down by Caldwell—for return flow prior to July 11, 1913.

THE COURT: Either side may have thirty days in which to prepare the statement to be used on appeal.

Duly settled and allowed this 24th day of August, 1915.

FRANK S. DIETRICH.

Endorsed: Filed August 24th, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
VS.

ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

#### OPINION AND FINDINGS OF THE COURT.

The question as to the form of action, suggested by Mr. Wing, as well as by Captain Davis, in the course of the action, it seems to me is without any substantial merit. The plaintiff has come into court upon the theory that it had certain rights to the use of water of Boise River, and that these rights have been invaded. Now, it has pleaded the facts, and it is for the court to award such relief as is proper under those facts. It would seem to me to be quite impossible for a plaintiff whose rights have been violated to recover at all if we give place to the rather



technical view advanced under this head. Here was the plaintiff with a large irrigation system, through which it diverted water from the stream and delivered it to different persons for irrigation purposes, conceded to be a beneficial use and one for which water may be appropriated in this State. The plaintiff is not the owner of any lands, that is to say, it is not itself using the water, had no need for water for irrigation purposes, but it was selling it or renting it, and getting a certain consideration therefor from various farmers who had need of it. It seems to me if we lay aside any preconceived ideas of form and give heed only to substance, the damage which the Government suffered, if any, is the loss which it sustained by reason of not being able to supply the water to the persons entitled to it, and which it had the conduits to convey, and for which it had a demand. It strikes me, therefore, that the measure of damages resorted to by counsel for the government in the case is the only available one. It is the least possible damage that could be suffered, perhaps. It may be that if the farmers with whom it had contracts to deliver water suffered loss of crops as a consequence of the non-delivery, and could recover from the Government, the Government could recover an additional amount for the alleged interference with its rights. It would seem to me that the defendants are not here in a position to complain because this apparently small measure of damages has been resorted to. I really haven't any question at all about the general legal phases of the case. The great diffi-

culty is in adopting any definite theory in accordance with which I can make an estimate of the damage, that is, as to the amount of water that the plaintiff was entitled to from day to day. It is very easy to adopt any one of half a dozen different methods and arrive at different conclusions, and none of them is entirely unreasonable, but they all involve certain contingent factors and features which very materially affect the result. Perhaps that is not true of the claim for damages on account of loss of water for power. It is clear to me that the government had a right to use the water for the development of power. The mere fact that no express permit from the State Engineer is shown does not deprive it of the right to use water for that purpose. The use of it for that purpose is a beneficial one, and it erected its plant there and installed machinery, and developed power, and certainly no one without right or need could with impunity deprive it of the use of water which naturally flowed in the channel of the stream. No explanation has been given as to why the water was diverted into the canal and then permitted to waste out through this waste gate. It would seem to me that the defendants were very much wanting in the exercise of ordinary care in doing that, especially as their attention was called to it, as I understand the witness, Mr. Bliss, testified. He suggested to them at one time that they regulate the water by the intake gates rather than by these waste gates. Of course, that is the natural way to regulate the supply of water, by the intake gates rather than by the



waste gate. True, there is the uncertain factor of the amount of water which would naturally waste through these gates. They were not in perfect condition; that is conceded. There is also the possibility that the Government would not have gotten the full benefit of the water had it flowed into the river and through its turbines. A great many contingencies there are about the sale of power. Even though plaintiff had a contract, and even though it be now stated by Mr. Markhus, on behalf of the Idaho-Oregon Company, that he could and would have taken all the power, we know that there are contingencies.

I have concluded to allow on that account as damages the sum of \$200.00. And, without going into a discussion of the details of the allowance to be made upon the other account, and treating it a good deal as a jury would have to treat an issue of that kind in a damage case, where there are a great many possible views which may be taken, and where the jury may reconcile those views and reach a conclusion, I think I shall allow the sum of \$800.00, on account of loss for irrigation, making a total of \$1,000.00.

As I have said, there are methods by which the conclusion could be reached to allow nothing, or substantially nothing, on account of the loss for irrigation purposes, and on the other hand the amount could be increased to nearly \$5,000.00 on one basis of calculation; but I am inclined to think that this amount will do substantial justice. There is the consideration here that one of the defendants, per-

haps the chief defendant, was acting as a State officer, and apparently was acting under the advice of the Attorney General. While I have held, and still feel, that such advice was mistaken, and that the defendant did not act with due caution, still at the same time the benefit of whatever doubt there is should perhaps be indulged in favor of the defendant under such circumstances.

The judgment will be, gentlemen, that the defendants pay the sum of \$1,000.00.

MR. DAVIS: We desire to file our notice of appeal.

THE COURT: Very well.

Correct.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed August 24, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,

vs.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

### JUDGMENT.

This cause came on to be heard at Boise, Idaho, on the 10th day of June, 1915, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:



That the plaintiff have and recover from the defendants the sum of One Thousand (\$1,000.00) Dollars, with costs taxed in the sum of \$56.65.

June 16, 1915.

FRANK S. DIETRICH,  
Judge.

Endorsed: Filed June 16, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.

ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

NOTICE OF LODGMENT OF STATEMENT.

*To the above-named complainant, and to B. E. Stoutemyer and James L. McClear, its attorneys.*

You and each of you will please take notice that the defendants, Elias Marsters and E. F. Lakin, by their attorneys, have this day lodged in the office of the clerk of the said court, for the examination of the plaintiff and its attorneys, a statement of the evidence to be included in the record of the appeal in the said cause to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with paragraph (b) of rule 75, Rules of Practice for the courts of equity of the United States, in force February 1st, 1913.

You are further notified that on the 19th day of

July, 1915, at ten o'clock a. m., or as soon thereafter as counsel can be heard, in the judge's chambers at Boise, Idaho, the defendants will ask the judge of said court to approve the said statement.

Dated this 10th day of July, 1915.

J. H. PETERSON,  
Attorney General.

E. G. DAVIS,

T. C. COFFIN,

HERBERT WING,

Attorneys for Defendants.

Service of the above and foregoing notice of lodgment of statement on appeal is hereby admitted this 10th day of July, 1915.

UNITED STATES OF AMERICA.

J. S. McClear,

J. R. Smead,

Its Attorneys.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,

VS.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

PETITION FOR APPEAL.

The above named defendants, conceiving themselves aggrieved by the decree made and entered on



the 11th day of June, 1915, in the above entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal be allowed and that citation issue as provided by law, and that the transcript of the record proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California.

And your petitioners further pray that the proper order, touching the security to be required of them to perfect the appeal, be made.

J. H. PETERSON,  
Attorney General.

E. G. DAVIS,  
T. C. COFFIN,

HERBERT WING,  
Attorneys for Defendants.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

## ASSIGNMENT OF ERRORS.

Come now the defendants and appellants by J. H. Peterson, E. G. Davis, T. C. Coffin and Herbert Wing, their solicitors, and say that the decree entered in the above cause on the 16th day of June, 1915, is erroneous and unjust to these defendants and appellants, and that in the records and proceedings in the above entitled cause, there is manifest error in this, to-wit:

### I.

The Court erred in holding that there is no decree of the waters of the Boise River which is effective for any purpose whatever.

### II.

The Court erred in holding that, under the statutes of the State of Idaho, a Water Commissioner has no power, through a water master appointed by him or otherwise, to control the diversion gates upon a stream the rights in which have not been adjudicated or otherwise definitely determined.

### III.

The Court erred in holding that the defendant, Elias Marsters, as Water Commissioner, had no authority, under the laws of the State of Idaho, to take possession of the gates of the plaintiff and to distribute the waters of the Boise River according to the rights which had been established thereon, whether by user, adjudication of court or otherwise.

### IV.

The Court erred in holding that the water rights



on the Boise River have not been adjudicated or otherwise definitely determined.

#### V.

The Court erred in denying defendants' motion to dismiss the bill of complaint filed by the plaintiff herein.

#### VI.

The Court erred in permitting plaintiff to file a supplemental bill of complaint herein.

#### VII.

The Court erred in entertaining jurisdiction and receiving evidence in this case which, in order to be decided favorably to the plaintiff must necessarily involve an adjudication and determination of water rights and the duty of water in the Boise River, after the attention of the Court had been invited to the fact that the question of water rights and the duty of water in the said river was and for a long time prior thereto had been pending before the District Court of the 7th Judicial District of the State of Idaho, in a suit brought for the determination of that very question.

#### VIII.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence wholly failing to show that, at the stage of the river on the days when, as alleged, the plaintiff was deprived of water and after supplying all prior rights with the amounts to which they were entitled, there was any water in any

amount in the Boise River which the plaintiff could lawfully divert at its headgates and claim as its own.

### IX.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence showing affirmatively that on the 11th day of July, 1915, appropriators prior in time to the plaintiff were receiving from the Boise River much less water than the amount of their decreed rights, and that they were prevented from receiving the amount of their said decreed rights by the action of the defendant in taking from the river more water than it was entitled to claim.

### X.

The Court erred in awarding damages to the plaintiff in any sum for the loss of power which may have been developed at its power plant on the Boise River, since the evidence shows affirmatively that the action of the defendant resulted in an increased power development, and since there is no evidence whatever, showing or tending to show that the plaintiff had any right to the use of the waters of the Boise River for power development, or the extent of that right, if any exists, or that, if any such right exists, the said right had been in any way impaired.

### XI.

The Court erred in holding that damages for loss of water could be awarded to plaintiff without a full showing that the plaintiff was actually entitled to water at the time or times in question, after all prior appropriators had been fully supplied with the sev-



eral amounts to which they had become entitled, and the Court further erred in holding that this question could be determined without an adjudication of the duty of water and the number and amount of all prior appropriations of water on the Boise River.

## XII.

The Court erred in holding that the plaintiff could collect damages for the loss of a given amount of water, there being no showing whatever that this alleged loss of water had resulted in loss of crops, or that the plaintiff could have sold the said water, of which it alleges it has been deprived, even though it had been allowed to divert the same freely and without let or hindrance.

## XIII.

The evidence is wholly insufficient and inconclusive to sustain a judgment for damages in any amount.

## XIV.

The Court erred in holding that the plaintiff having introduced in evidence the so-called Stewart decree (Plaintiff's Exhibit G) was not bound by all matters covered by the said decree, and the customary distribution of water thereunder.

J. H. PETERSON,  
Attorney General.  
E. G. DAVIS,  
T. C. COFFIN,  
HERBERT WING,

Attorneys and Solicitors for Defendants and  
Appellants, E. Marsters and E. F. Lakin.

Residence: Boise, Idaho.

Service of a copy of the above and foregoing assignment of errors, together with the receipt of a copy thereof, is hereby admitted this 10th day of July, 1915.

J. L. McCLEAR,  
J. R. SMEAD,  
Attorneys for Plaintiff.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

ORDER ALLOWING AN APPEAL.

This day came the defendants above named, and presented their petition for an appeal and an assignment of errors accompanying the same, which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, on the filing of a bond in the sum of Fifteen Hundred Dollars (\$1500.00) of good and sufficient security to be approved by the court.

FRANK S. DIETRICH,  
District Judge.

Dated this 10th day of July, 1915.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.



*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

BOND ON APPEAL.

*Know All Men By These Presents*, That the United States Fidelity & Guaranty Co., a corporation duly organized under the laws of the State of Maryland, and duly qualified and authorized to do business and to become surety on bonds within the State of Idaho, acknowledges itself to be indebted to the United States of America, appellee in the above cause, in the sum of One Hundred and Fifty Dollars (\$150.00), conditioned that, whereas, on the 16th day of June, 1915, in the District Court of the United States, for the District of Idaho, in that certain suit pending in that court, wherein the United States of America was complainant, and Elias Marsters and E. F. Lakin were defendants, a decree was rendered and entered against the said defendants, and the said defendants having obtained an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation having been directed to the United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State

of California, within forty-five (45) days from the 10th day of August, 1915.

*Now, Therefore,* If the said Elias Marsters and E. F. Lakin shall prosecute their said appeal to effect and answer all costs, if they shall make their plea good, then the above obligation will be void, otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY CO.

By W. D. McReynolds, Attorney in Fact.

J. T. Pence, Attorney in Fact.

Approved: Frank S. Dietrich, District Judge.

Endorsed: Filed Sept. 1, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
VS.

ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

ORDER REDUCING BOND.

*Whereas,* On the 10th day of July, 1915, an order allowing an appeal in the above entitled cause was signed by me, in which the bond to be filed in the said cause was fixed at the sum of Fifteen Hundred Dollars (\$1500.00), the same to be a supersedeas and cost bond, and

*Whereas,* It has been made to appear to me that the said defendants are unable to obtain a bond in the said amount, and will, therefore, be unable, un-



less the said bond is reduced, to prosecute their said appeal;

*Now, Therefore, It is Ordered*, That the said appeal be allowed on the filing of a bond in the sum of One Hundred and Fifty Dollars (\$150.00) of good and sufficient security to be approved by the court, the same to constitute a bond for costs only.

FRANK S. DIETRICH,  
District Judge.

Dated this 1st day of September, 1915.

Endorsed: Filed Sept. 1, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.  
ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

CITATION.

*United States of America to United States of America, Greetings:*

You are hereby notified that in a certain case in equity in the United States District Court, in and for the District of Idaho, wherein the United States of America is complainant, and Elias Marsters and E. F. Lakin are defendants, an appeal has been allowed defendants herein to the United States Circuit Court of Appeals of the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at San Francisco, State of California, thirty days after the date of this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

*Witness*, The Honorable Frank S. Dietrich of the United States District of Idaho, this 10th day of July, 1915.

FRANK S. DIETRICH,  
United States District Judge.

Attest: A. L. Richardson, Clerk.

Service of a copy of the above and foregoing citation, together with a receipt of a copy thereof, is hereby admitted this 10th day of July, 1915.

J. L. McCLEAR,  
J. R. SMEAD,

Attorneys for Complainant.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
VS.

ELIAS MARSTERS and E. F. LAKIN,  
Defendants.

STIPULATION RELATIVE TO RECORD ON  
APPEAL.

It is hereby stipulated and agreed, by and between Elias Marsters and E. F. Lakin, appellants, and the



United States of America, appellee, through their respective solicitors, that in order to save expenses in the printing and certification of the record, and to avoid encumbering the record with papers and documents not pertinent to the consideration of the appeal, the following portions of the record and no more shall be transcribed, certified and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of the United States District Court for the District of Idaho, under the appeal taken by the said appellants herein, and shall be included in the printed record on said appeal, to-wit:

1. Bill of Complaint.
2. Notice to show cause why temporary restraining order *pendente lite* should not be granted.
3. Motion to dismiss.
4. Memorandum decision on demurrer. (Motion to Dismiss.)
5. Affidavit of George H. Bliss, Project Manager.
6. Petition for leave of court to file supplemental bill of complaint.
7. Stipulation as to time of defendants to file answer.
8. Same.
9. Same.
10. Answer of the defendants.

11. Supplemental bill of complaint.
12. Answer to supplemental bill of complaint.
13. Statement on appeal, under Equity Rule 75 (b).
14. Opinion and findings of court filed in said cause.
15. Decree.
16. All papers filed for perfecting the appeal.
  - (a) Notice of lodgment of statement on appeal.
  - (b) Petition for appeal.
  - (c) Assignment of errors.
  - (d) Order allowing appeal.
  - (e) Bond on appeal.
  - (f) Citation and all orders made in connection therewith, with all admissions or returns of service of any of said papers.
17. This stipulation.

It is further stipulated and agreed that all exhibits introduced in the above entitled cause shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, before the hearing of the cause in said court, and the same may be used upon the argument upon the hearing of said cause in said court, and shall be considered as a part of the record on appeal therein as fully and to the same extent as if transcribed and printed in the record.

It is further stipulated that it shall not be neces-



stary to reproduce or print in the record on appeal, any maps or plats introduced in evidence on the trial of said cause.

Appellants shall have the right, and they may be so required by appellee, if deemed necessary, and approved by the judge of the said district court or the circuit court of appeals, to print as part of the record on appeal, any exhibit or any other part of the record not hereby expressly authorized to be transmitted and printed.

Dated this 10th day of July, 1915.

J. L. McCLEAR,

United States Attorney.

B. E. STOUTEMYER,

Solicitors for Complainant and Appellee, the United States of America.

J. H. PETERSON,

Attorney General.

E. G. DAVIS,

T. C. COFFIN,

HERBERT WING,

Solicitors for Defendants and Appellants.

Endorsed: Filed September 1, 1915. A. L. Richardson, Clerk.

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*In the District Court of the United States, in and for  
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,

VS.

ELIAS MARSTERS and E. F. LAKIN, Defendants.

PRAECIPE TO CLERK FOR TRANSCRIPT ON  
APPEAL.

To the Clerk of the said Court:

You will please incorporate the following portions of the record in the above entitled cause into the transcript on the appeal in the said cause to the United States Circuit Court of Appeals, to-wit:

1. Bill of Complaint.
2. Notice to show cause why temporary restraining order *pendente lite* should not be granted.
3. Motion to dismiss.
4. Memorandum decision on demurrer. (Motion to dismiss.)
5. Affidavit of George H. Bliss, Project Manager.
6. Petition for leave of court to file supplemental bill of complaint.
7. Stipulation as to time of defendants to file answer.
8. Same.
9. Same.
10. Answer of the defendants.
11. Supplemental bill of complaint.
12. Answer to supplemental bill of complaint.
13. Statement on appeal, under Equity Rule 75 (b).



14. Opinion and findings of court filed in said cause.
15. Decree.
16. All papers filed for perfecting the appeal.
  - (a) Notice of lodgment of statement on appeal.
  - (b) Petition for appeal.
  - (c) Assignment of errors.
  - (d) Order allowing appeal.
  - (e) Bond on appeal.
  - (f) Citation and all orders made in connection therewith, with all admissions or returns of service of any of said papers.
17. Stipulation relative to record on appeal.
18. This praecipe.

J. H. PETERSON,

Attorney General, State of Idaho.

E. G. DAVIS,

T. C. COFFIN,

HERBERT WING,

Attorneys for Defendants and Appellants.

Service of the foregoing praecipe, with receipt of a copy of the same, is hereby admitted this 10th day of July, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Solicitors for Complainant and Appellee.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court, that the foregoing Transcript of the Record and Proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest:

A. L. RICHARDSON, Clerk.

By Pearl E. Zanger, Deputy.

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*In the District Court of the United States, in and for  
this District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,  
vs.

ELIAS MARSTERS and E. F. LAKIN, Defendants.

CLERK'S CERTIFICATE.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript, consisting of Pages 1 to 164, inclusive, to be full, true and correct copies of the Bill of Complaint, notice to show cause why temporary restraining order *pendente lite* should not be granted, Motion to Dismiss, Memorandum decision on demurrer (Motion to dismiss), Affidavit of George H. Bliss, Project Manager, Petition for leave of court to file supplemental bill of complaint, Stipulations as to time of defendants to file answer, Answer of the defendants, Supplemental bill of complaint, Answer to supplemental bill of complaint,



Statement on appeal under Equity Rule 75 (b), Opinion and findings of court filed in said cause, Decree, Notice of lodgment of statement on appeal, Petition for Appeal, Assignment of Errors, Order allowing appeal, Bond on Appeal, Stipulation Relative to Record on Appeal, Praecipe, Original Citation, Return to Record, and Clerk's Certificate, and that the same, together constitute the Transcript of the Record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$191.80, and that the same has been paid by the appellant.

*Witness* my hand and seal of said court affixed at Boise, Idaho, this 14th day of September, 1915.

A. L. RICHARDSON, Clerk.

By Pearl E. Zanger, Deputy.

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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ELIAS MARSTERS and E. F. LAKIN,  
Appellants,  
VS.  
UNITED STATES OF AMERICA,  
Appellee.

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**Brief of Appellants**

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Appeal from the United States District Court for  
the District of Idaho, Southern Division.

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JOSEPH H. PETERSON,  
Attorney General of the State  
of Idaho.  
E. G. DAVIS,  
T. C. COFFIN,  
HERBERT WING,  
Solicitors for Appellants.  
E. G. DAVIS,  
Of Counsel.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ELIAS MARSTERS and E. F. LAKIN,  
Appellants,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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BRIEF OF APPELLANTS.

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Appeal from the United States District Court for  
the District of Idaho, Southern Division.

---

JOSEPH H. PETERSON,  
Attorney General of the State  
of Idaho.  
E. G. DAVIS,  
T. C. COFFIN,  
HERBERT WING,  
Solicitors for Appellants.  
E. G. DAVIS,  
Of Counsel.





United States  
Circuit Court of Appeals

For the Ninth Circuit.

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ELIAS MARSTERS and E. F. LAKIN,  
Appellants,  
VS.  
UNITED STATES OF AMERICA,  
Appellee.

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BRIEF OF APPELLANTS.

---

Appeal from the United States District Court for  
the District of Idaho, Southern Division.

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STATEMENT OF THE CASE.

The Boise River is a stream emptying into the Snake River in Canyon County, Idaho, the waters of which are used for the purpose of irrigation in Ada and Canyon Counties.

The United States is an appropriator of water from this river for the irrigation of lands included within the Boise Irrigation project.

There are one hundred and thirty-four appropriators whose rights are prior in time to the right of the United States.



The United States in this proceeding must be regarded as any other appropriator, and its rights in the waters of the Boise River determined under the law which regulates the acquiring of priorities in the waters of this state. (Memorandum Decision on Demurrer, Transcript pp. 19-24).

The right of the United States to the waters of Boise River is evidenced by a certificate of the State Engineer of the State of Idaho, under which was acquired the right to use 1647 second feet of the waters of Boise River, under date of priority of December 4, 1903. The right under this certificate does not represent an absolute right to the said amount of water or to any other given amount, but only the right to use that amount if it can be obtained after all other prior rights are fully satisfied. We believe there can be no dispute or controversy on this proposition.

Neilson vs. Parker, 19 Idaho 727, 115 Pac. 488.

Speer vs. Stevenson, 16 Idaho 707, 102 Pac. 365.

In the year 1902 an action was commenced in the District Court of the Seventh Judicial District of the State of Idaho for the purpose of having adjudicated the rights and priorities in the waters of the Boise River. Neither the United States nor its predecessors in interest were made parties to this action for the reason that their rights had not even been initiated when the action was commenced. In

January, 1906, a decree was entered in the said action, fixing the rights and priorities of all appropriators prior in time to the United States. The decision of the trial court was affirmed on appeal (*Farmers' Co-operative Ditch Co. vs. Nampa, etc. Irr. Dist.*, 14 Ida. 450, 94 Pac. 761) ; but the matter later came before the Supreme Court of Idaho on appeal from an order denying a new trial asked for by certain parties to the action in the court below, and at this latter hearing the said Supreme Court specifically affirmed the finding of the trial court as to the "respective rights and priorities," but remanded the case for further hearing on the single question of the duty of water. *Farmers' Co-operative Ditch Company vs. Riverside Irrigation District et al.*, 16 Idaho, 525, 102 Pac. 481.

In remanding the case for further hearing the court said:

"After a somewhat extended and very careful examination of the record in this case, we are convinced that justice demands, and the record justifies, the granting of a new trial to the extent and for the purpose of determining the question as to the duty of water on the two classes of lands mentioned in this decree \* \* \*

The judgment will be affirmed as to the respective rights and priorities of the several claimants and appropriators whose rights have been litigated in this case. A new trial will be granted for the sole and only purpose of determining the duty of water on the two classes of lands in-



volved in this action, namely, bench and bottom lands.     \*     \*     \*     In the event the court, after hearing the evidence should determine upon fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre, it will modify the findings and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree." *Farmers' Co-operative Ditch Company vs. Riverside Irrigation District et al.*, 16 Idaho 525, at pages 535 and 538.

The case as thus remanded required the taking of a great mass of evidence, and it was still pending before the trial court at the time the alleged cause of action in this case arose.

It will thus be seen that prior to the time of the acts complained of in this case, there had been an adjudication of the waters of the Boise River claimed by appropriators prior in time to the United States; that the judgment of the trial court had been affirmed "as to the respective rights and priorities of the several claimants and appropriators whose rights have been litigated in this case;" and that the case had been remanded to the trial court for the "sole and only purpose of determining the duty of water on the two classes of lands involved in this action, namely, bench and bottom lands." The total amount of water thus adjudicated was 2755 second feet. (See Steward Decree, Plaintiff's Exhibit G.)

As set forth in the bill of complaint in this case, paragraphs XIII, et seq., it has been the yearly custom of the court before which this question as to the duty of water is pending to issue a temporary order, or decree fixing the duty of water for the irrigation season in which issued. This order had generally been issued in July after the water in the river had fallen to the point where it was necessary to limit somewhat the amount of water allowed to individual users in order that the crops depending on water from this source might be saved. The order in question was issued for the year 1913 on the 18th of July. (Plaintiff's Exhibit F.) These orders have invariably fixed the duty of water, for the latter, or shortage, part of each irrigation season only, at six-tenths of an inch per acre.

The defendant Elias Marsters was on the 11th day of July, 1913, the duly appointed and acting Water Commissioner of water division No. 3, of the State of Idaho, which division includes the Boise River. This division is created and defined by Section 3268, Revised Codes of Idaho. The defendant E. F. Lakin was the duly elected and acting water master in direct charge of the waters of the Boise River, at the point of diversion of the government canal.

Some time prior to July 11, 1913, Elias Marsters and E. F. Lakin, acting as Water Commissioner and Water Master, respectively, found that it was necessary to deprive the United States of a part of the



water which it was diverting at its dam in order that prior appropriators might be supplied with the water to which they were entitled. They first applied to the project manager to turn down a part of the water which was being diverted from the Boise River into the canal of plaintiff, and upon being refused, the Water Commissioner, Elias Marsters, acting under the advice of the Attorney General of the State of Idaho, and the Water Master, E. F. Lakin, went upon the property and headgates of the plaintiff and cut the locks fastening the said gates and proceeded to regulate the flow of water in plaintiff's canal.

The officers in charge of the Boise project of the plaintiff, refusing to recognize the authority of the Water Commissioner and the Water Master under his supervision, to regulate the waters of the Boise River, the Water Commissioner retained control of the gates of the plaintiff during the remainder of the irrigation season of 1913, or until October 3, 1913.

On July 12th, 1913, the plaintiff, through its attorneys, filed in the District Court of the United States for the District of Idaho, Southern Division, a bill of complaint in which the prayer asked for an injunction restraining the defendants from assuming control of the headgates of plaintiff as threatened and for Ten Thousand Dollars per day for each and every day that the water should be shut out of the plaintiff's canal, without reference to the amount of which it might be deprived or of the value of the said water

for the purpose to which it might properly have been applied.

On July 11th, 1913, the defendants assumed control of the headgates of the plaintiff, as above set out, and on November 1st, 1913, the plaintiff filed a supplemental bill of complaint in which there was a prayer for a permanent injunction against further interference with the headgates of plaintiff and for damage in the sum of forty-eight thousand dollars, alleged to have been sustained by reason of damage to the rental value of the irrigation works of plaintiff, loss of water for irrigation purposes, loss of water for power purposes and injury to the public lands of the United States.

The case came on duly for trial on the 10th day of June, 1915, before the court sitting without a jury, and judgment was rendered, awarding damages to the plaintiff in the sum of Eight Hundred Dollars for loss of water for irrigation purposes, and Two Hundred dollars for loss of water for power purposes.

From this judgment and from the whole thereof the defendants appeal to this court, and assign the following

## SPECIFICATION OF ERRORS:

### I.

The Court erred in holding that there is no decree of the waters of the Boise River which is effective for any purpose whatever.



## II.

The Court erred in holding that, under the statutes of the State of Idaho, a Water Commission has no power, through a water master appointed by him or otherwise, to control the diversion gates upon a stream the rights in which have not been adjudicated or otherwise definitely determined.

## III.

The Court erred in holding that the defendant, Elias Marsters, as Water Commissioner, had no authority, under the laws of the State of Idaho, to take possession of the gates of the plaintiff and to distribute the waters of the Boise River according to the rights which had been established thereon, whether by user, adjudication of court or otherwise.

## IV.

The Court erred in holding that the water rights on the Boise River have not been adjudicated or otherwise definitely determined.

## V.

The Court erred in denying defendants' motion to dismiss the bill of complaint filed by the plaintiff herein.

## VI.

The Court erred in permitting plaintiff to file a supplemental bill of complaint herein.

## VII.

The Court erred in entertaining jurisdiction and receiving evidence in this case which, in order to be

decided favorably to the plaintiff must necessarily involve an adjudication and determination of water rights and the duty of water in the Boise River, after the attention of the Court had been invited to the fact that the question of water rights and the duty of water in the said river was and for a long time prior thereto had been pending before the District Court of the 7th Judicial District of the State of Idaho, in a suit brought for the determination of that very question.

### VIII.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence wholly failing to show that, at the stage of the river on the days when, as alleged, the plaintiff was deprived of water and after supplying all prior rights with the amounts to which they were entitled, there was any water in any amount in the Boise River which the plaintiff could lawfully divert at its headgates and claim as its own.

### IX.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence showing affirmatively that on the 11th day of July, 1915, appropriators prior in time to the plaintiff were receiving from the Boise River much less water than the amount of their decreed rights, and that they were prevented from receiving the amount of their said decreed rights by the action of defendant in taking from the river more water than it was entitled to claim.



## X.

The Court erred in awarding damages to the plaintiff in any sum for the loss of power which may have been developed at its power plant on the Boise River, since the evidence shows affirmatively that the action of the defendant resulted in an increased power development, and since there is no evidence whatever, showing or tending to show that the plaintiff had any right to the use of the waters of the Boise River for power development, or the extent of that right, if any exists, or that, if any such right exists, the said right had been in any way impaired.

## XI.

The Court erred in holding that damages for loss of water could be awarded to plaintiff without a full showing that the plaintiff was actually entitled to water at the time or times in question, after all prior appropriators had been fully supplied with the several amounts to which they had become entitled, and the Court further erred in holding that this question could be determined without an adjudication of the duty of water and the number and amount of all prior appropriations of water on the Boise River.

## XII.

The Court erred in holding that the plaintiff could collect damages for the loss of a given amount of water, there being no showing whatever that this alleged loss of water had resulted in loss of crops, or that the plaintiff could have sold the said water, of

which it alleges it has been deprived, even though it had been allowed to divert the same freely and without let or hindrance.

### XIII.

The evidence is wholly insufficient and inconclusive to sustain a judgment for compensatory damages in any amount.

### XIV.

The Court erred in holding that the plaintiff having introduced in evidence the so-called Stewart decree (Plaintiff's Exhibit G) was not bound by all matters covered by the said decree, and the customary distribution of water thereunder.

## BRIEF OF ARGUMENT.

### POINTS.

The specifications of error may be grouped under the following points which will be used as main heads in the argument which follows.

### I.

At the time of the commission of the acts of defendants of which plaintiff complains, at the time of the commencement of the action in the court below and at the time of its trial, there was a valid and subsisting decree of the waters of the Boise River which it was the legal duty of defendants to enforce and which the plaintiff was bound to respect.

Under this point we consider particularly:

(a) The decree itself, when and where rendered.



(b) The action of the Supreme Court of Idaho on the said decree.

(c) The legal status of the decree at the time the alleged cause of action arose.

(d) The law which it was the legal duty of defendants to enforce.

This point is raised by Specifications of Error 1, II, III and IV.

## II.

The trial court, in passing upon the motion to dismiss the bill of complaint (Memorandum Decision on Demurrer, Tr. of Record, pp. 19-24), quoted and applied as the law of the case, governing the standing of the parties, certain matter which had been the law of the State of Idaho prior to the year 1909, but which has been repealed by the Legislature in that year, and which was no part of the law of the State at the time the cause of action arose. The trial court also failed to consider and apply as the law of the case certain new matter which had been enacted in 1909, and which made the law of the case, as applicable to the parties before the court, radically different from what the court evidently supposed it to be.

This point is raised by Specifications of Error V. and VI.

## III.

If it be true that at the time the cause of action in this case arose, there was no valid and subsisting decree of the waters of the Boise River, then the

trial court would be under the practical necessity of making findings equivalent to the entry of such a decree, before the right of plaintiff to the use of the water of which it claims to have been unjustly deprived could be established. The District Court of the 7th Judicial District of the State of Idaho having before it the question of the ascertainment of the duty of water on the Boise River and the application thereof to the priorities as established, the trial court in this case should have refused jurisdiction of any matter which either directly or indirectly involved the rights of prior appropriators.

This point is raised by Specification of Error VII.

#### IV.

Before the plaintiff is entitled to damages for loss of the use of water for irrigation purposes, it must clearly establish its right to such use. Such rights can only be established by showing that after all prior appropriators had been supplied with the water to which they were entitled, there was still sufficient water in the source of supply to furnish plaintiff with the quantity which it was diverting at the time in question and of which it claims to have been unlawfully deprived.

This point is raised by Specifications of Error VIII, IX, and XI.

#### V.

Before the plaintiff is entitled to damages for loss of the use of water for power development, it must clearly establish that the act complained of has re-



sulted in an actual loss of power. If it should appear that by reason of the act complained of more power has actually been developed than would have been the case if the act had not been committed, the plaintiff has entirely failed to establish any ground whatever for the award of damages.

This point is raised by Specification of Error X.

## VI.

Where plaintiff diverts water for sale or rental, the amount of money received depending upon the measured quantity of water actually delivered, it must, before it can establish a right to damages for the loss of a part of its water, show by competent evidence that the water would have been actually sold if not interfered with and the purchase or rental value realized.

This point is raised by Specification of Error XII.

## VII.

In an action for damages resulting from the loss of water damages can not be awarded upon evidence which is wholly insufficient and inconclusive to establish the right claimed to have been violated or the amount of the loss.

This point is raised by Specification of Error XIII.

I. *At the time of the commission of the acts of defendants of which plaintiff complains, at the time of the commencement of the action in the court below, and at the time of its trial, there was a valid and*

*subsisting decree of the waters of the Boise River which it was the legal duty of defendants to enforce, and which the plaintiff was bound to respect.*

(a) The decree itself, when and where rendered.

An action was instituted by the Farmers' Co-operative Ditch Company against numerous appropriators of water from the Boise River, for the purpose of adjudicating the priorities among the several appropriators. The complaint was filed August 20, 1902, in the District Court of the 3rd (now the 7th) Judicial District of the State of Idaho, in and for the County of Canyon. The defendants answered and also filed cross-complaints setting up their several rights, appropriations and priorities, and asking for affirmative relief decreeing their several appropriations and the times from which they should date.

On January 18, 1906, findings of fact and conclusions of law and judgment were made and entered. (See statement of the case in Farmers' Co-operative Ditch Company vs. Riverside Irrigation District, et al., 14, Idaho 450, 94 Pac. 761.

(b) The action of the Supreme Court of Idaho on the said decree.

From the findings and decree of the district court as entered in this case, the Nampa and Meridian Irrigation District, one of the parties to the said action, prosecuted an appeal to the Supreme Court of the State of Idaho. The Supreme Court of the State of Idaho, acting upon this appeal, held that the judg-



ment of the trial court should be affirmed, and it was so ordered. *Farmers' Co-operative Ditch Co. vs. Riverside Irrigation District, et al.*, 14 Ida. 450, 94 Pac. 761.

In due course of time, the subject matter of this case again came before the Supreme Court of Idaho on an appeal from an order denying a new trial which was asked for by certain parties to the action in the trial court, and on passing upon the case as thus presented for the second time, the Supreme Court of Idaho specifically affirmed the respective rights and priorities of the several claimants and appropriators whose rights had been litigated in this case, and directed a new trial for the sole and only purpose of determining the duty of water on the two classes of lands involved in the action, namely bench and bottom lands. In so sending the case back to the trial court for further evidence on the one point indicated, the Supreme Court of Idaho was careful to say as follows:

“In the event the court, after hearing the evidence, should determine on fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre it will modify the finding and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree.” *Farmers' Co-operative Ditch Co. vs. Riverside Irrigation District et al.*, 16 Ida. p. 538.

(c) The legal status of the decree at the time the alleged cause of action arose.

In his memorandum decision on demurrer, Tr. of Record, pp. 19-24, the court below said:

“It cannot be held that there is any decree adjudicating the waters of the Boise River. By reason of the reversal or modification by the Supreme Court of the decree originally entered in the suit referred to it is ineffective for any purpose. The prime requisites of any decree in a water right suit are both the date and the amount of the appropriation. As the decree in the case referred to now stands it only fixes the date of the appropriation.”

It is contended by defendants that in so holding the court below entirely misunderstood and misconstrued the decision of the Supreme Court of Idaho to which reference was made. As indicated above, a decree adjudicating the waters of Boise River had been rendered in 1906. This decree was introduced in evidence by the plaintiff in this case, and is marked Plaintiff's Exhibit “G.”

As above stated, at the time that matter was before the Supreme Court of Idaho on Appeal from an order denying a new trial, the case was remanded to the trial court for the taking of further evidence on the question of the duty of water on the two classes of lands involved in the case. In its decision remanding the case, the Supreme Court of Idaho laid down three propositions which appear to us absolutely controlling, both as to the meaning to be attributed to the decision of the court, and as to the



present status of the Boise River, with reference to the adjudication or non-adjudication of its waters: These three propositions are as follows:

1. "After a somewhat extended and very careful examination of the record in the case, we are convinced that justice demands, and the record justifies, the granting of a new trial to the extent and for the purpose of determining the question as to the duty of water on the two classes of land mentioned in the decree." *Farmers' Co-operative Ditch Company vs. Riverside Irrigation District et al.*, 16 Idaho at page 535.

2. "The judgment will be affirmed as to the *respective rights and priorities* of the several claimants and appropriators whose rights have been litigated in this case. *A new trial will be granted for the sole and only purpose of determining the duty of water on the two classes of lands involved in this action, namely, bench and bottom lands.*" (Same case, page 535.)

3. "In the event the court, after hearing the evidence, should determine upon fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre, it will modify the finding and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree." (Same case, page 538.)

With all due respect to the opinion of the learned trial court, we desire to submit that there is no language found in the decision of the Supreme Court of

Idaho which can properly be construed as an indication that that court intended either to “reverse” or modify” the findings of the trial court which rendered the decree adjudicating the waters of the Boise River among the several litigants who were parties to the suit in question. It simply held in this respect that the affidavits submitted on the motion for a new trial and the character of the evidence taken at the trial were such as to warrant the court in ordering a new trial “for the purpose of determining the duty of water on the two classes of lands mentioned in the decree.”

But while granting the new trial for the purpose indicated, the court was careful to say:

“The judgment will be affirmed as to the respective rights and priorities of the several claimants and the appropriators whose rights have been litigated in this case.”

It is somewhat difficult to understand, to say the least, how a water decree can be affirmed as to the “respective rights and priorities” of the parties to an action and it still be true, as held by the trial court in this case that there is no decree of said waters effective for any purpose whatever.

As though to emphasize what it had already said, the Supreme Court of Idaho, in the decision in question repeated:

“A new trial will be granted for the sole and only purpose of determining the duty of water on the two classes of land involved in this action.”



And then to make it absolutely clear that it had not modified the findings or decree of the trial court, it said:

“In the event, the court, after hearing the evidence should determine upon fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre, it will modify the findings and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree.”

The language of the decision affords no justification for believing that the Supreme Court of Idaho intended to modify in any manner the findings of the trial court upon any single point included within the decree, or to leave the status of the Boise River so that it could be claimed that there was no decree of its waters “effective for any purpose,” as was held by the trial court in this case. It believed that there should be further and better evidence taken on the question of the duty of water, and sent the case back to the trial court for that purpose. In the event, but only in the event the trial court, after hearing the additional evidence, should determine that a higher duty of water should be fixed, it was instructed to modify the finding and decree as to each appropriator. The inference is clear that if the trial court should not determine upon a higher duty of water, the decree as to the several appropriators should remain unchanged. It appears to us that nothing

could possibly be clearer considering the language used, than that the Supreme Court of Idaho intended by its decision to affirm the judgment and decree as rendered, subject only to being modified at a later date by the trial court as to the duty of water in the event the additional evidence to be taken should warrant such modification. The effect of the action was to give absolute finality to what had been done, except that jurisdiction was retained in the trial court to modify the findings and decree in one particular only, should further evidence warrant.

It is impossible to emphasize too strongly the importance of a correct holding upon this point. If as held by the trial court in this case, there is no decree of the waters of Boise River "effective for any purpose," it would seem to follow from this view of the case that the duly constituted and appointed officers of the State of Idaho are without jurisdiction to assume control of the distribution of such waters. If this be true, the laws of the State which were designed to protect all users of water upon any stream are practically set aside and orderly administration must give place to the rule of force under which each claimant may seize and hold all the water whose use he has the power to defend. The Boise River contains a large quantity of water, and supplies yearly some hundreds of thousands of acres for irrigation purposes. It is entirely clear that the Supreme Court of Idaho did not intend to undo all that had been done, and to again place the river in the same status as it had occupied before there had been any adjudication



whatever of the water rights thereon. How much fairer, and how much more promotive of justice it would be to hold now, as the Supreme Court of Idaho evidently intended should be held, that the status of the waters of the Boise River should be regarded as absolutely fixed and adjudicated according to the decree rendered by the trial court in the case referred to, unless and until the said trial court should modify the said decree after the taking of further evidence on the question of the duty of water.

There is nothing inconsistent with this holding so far as we have been able to determine in any of the adjudicated cases bearing upon this question, and we feel that the trial court in this case was led to adopt the views expressed and which are quoted above through an erroneous impression that the Supreme Court of Idaho had of itself actually modified or reversed the findings of the trial court as to the duty of water.

It seems to us that the trial court was clearly in error in this matter, and since the entire case of plaintiff was predicated upon the theory that there was no decree of the waters of Boise River, it follows that the judgment should be reversed and the bill of complaint dismissed.

(d) The law which it was the legal duty of defendants to enforce.

The law applicable to the administration of the waters of Boise River is in large part at least found in Sections 3274, 3275 and 3277, Revised Codes of

Idaho as amended by Session Laws 1909. (pp. 327-329.) These sections of the statute law of Idaho are printed in full in this brief in the discussion under point II.

II. *The trial court in passing upon the motion to dismiss the bill of complaint (Memorandum Decision on Demurrer, Tr. of Record, pp. 19-24) quoted and applied as the law of the case, governing the standing of the parties, certain matter which had been the law of the State of Idaho prior to the year 1909, but which had been repealed by the Legislature in that year, and which was no part of the law of the State at the time the cause of action arose. The trial court also failed to consider and apply as the law of the case certain new matter which had been enacted in 1909, and which made the law of the case as applicable to the parties before the court radically different from what the court evidently supposed it to be.*

In discussing the law applicable to the facts of this case as presented to the trial court on defendant's motion to dismiss the bill of complaint, the said court cited and construed Sections 3274 and 3275, Revised Codes of Idaho.

The writer of this brief was not a member of counsel in the preliminary stages of this case, and so is not informed as to whether or not the law which was in force at the time of the acts complained of was called to the attention of the court, except by copying the same, as was done, in the answer of defendants. The fact is, however, that the trial court con-



strued these sections as they had been originally enacted, not as they were copied in the answer of defendants, entirely overlooking the fact that they had been amended at the 1909 Session of the Legislature and their substance radically changed. In each case, it will be found that the provisions of Sections 3274 and 3275, as quoted and relied upon by the trial court as a basis for his decision, are not contained in these sections, as they existed at the time the court was presumed to be construing them. In order to afford this court a convenient reference to Sections 3274 and 3275, Revised Codes of Idaho, as amended at pages 327-329, Session Laws 1909, we quote the said sections in full.

Sec. 3274. The Board of Irrigation shall divide the State into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district; *Provided*, That any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts; and *Provided*, That any stream tributary to another stream may be constituted into a separate water district when the use of the waters therefrom does not affect or conflict with the rights to the use of the waters of the main stream; and *Provided*, That any stream may be divided into two (2) or more water districts, irrespective of the dis-

tance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district; and *Provided*, That this section shall not apply to streams or water supplies whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof.

Sec. 3275. There shall be held on the first Monday of March of each year, commencing at 2 o'clock p. m., a meeting of all persons owning or having the use of an adjudicated right, in the waters of the stream or water supply comprising such district. Such meeting shall be held at some place within the water district, convenient to a majority of those entitled to vote thereat, which place shall be designated by the water commissioner of the district, and he shall, between January first and February first of each year, file such designation with the county auditor of the county or counties within which such water district is situated and shall notify by mail all persons, companies or corporations known by him to own or claim the use of the waters of such district, and should said water commissioner fail to file such designation by February first, the district judge of the district within which such water district, or portion thereof, is situated, shall, upon application of some interested person, designate the place of holding such meeting,



and in case the first Monday in March has passed, such district judge may also designate the time of holding such meeting.

At such meeting there shall be elected a water master for such water district, and such other regular assistants as such meeting shall deem necessary, and such meeting shall, prior to the election of such water master and assistants, fix the compensation to be paid them, such compensation not to exceed four dollars (\$4.00) per day, during the time actually engaged in the performance of their duties. At such meeting each person present owning or having the use for the ensuing irrigation season of any adjudicated right equal to ten (10) inches of water in the stream or water supply comprising such water district shall be entitled to one (1) vote. Such meeting shall choose a chairman and secretary and shall determine the manner and method of electing water masters and assistants. Within five (5) days after such meeting the chairman and secretary shall forward a certified copy of the minutes of such meeting to the Water Commissioner of the district; *Provided*, That a corporation shall be considered a person for the purpose of this section and shall cast its vote by some one to be designated by the corporation; and *Provided*, That each stockholder in said corporation shall be entitled to as many votes as he shall have units of ten miners' inches of water, regularly adjudicated, in the stream or wa-

ter supply comprising such water district; and *Provided*, That should said meeting not be held or not choose a water master, or not fix the compensation thereof, then the Water Commissioner of the district may appoint such water master, and fix his compensation, not exceeding four dollars (\$4.00) per day.

The Water Commissioner may, at any time, remove any water master within his division for failure to perform his duty as such water master, upon complaint in that respect being made to him in writing by any person owning or having the right to the use of an adjudicated right in such district, and the Water Commissioner may appoint a successor for the unexpired term.

Before entering upon the duties of his office, said water master shall take and subscribe an oath before some officer authorized by the laws of the State to administer oaths, to faithfully perform the duties of his office, and shall file with the Clerk of the District Court in the county in which said water master resides, said oath and his official bond in the penal sum of five hundred dollars (\$500.00), with not less than two (2) sureties, to be approved by the judge of the probate court of the county in which he resides, and conditioned for the faithful discharge of the duties of his office.

We also print in full in an appendix to this brief, Sections 3274 and 3275, Revised Codes of Idaho, as they were originally enacted,



and as they were construed by the trial court, the parts quoted by the court appearing in italics. A simple comparison will show that the trial court did not have before him the law of the case when preparing his memorandum decision upon defendant's motion to dismiss the bill of complaint.

It will be observed that by the third paragraph of Sec. 3275, Revised Codes of Idaho, the Water Commissioner is given general jurisdiction over the water masters within his division through authority to require of them the performance of their duties and to remove any of them for failure in this respect. The Water Commissioner is also given authority to appoint a successor for the unexpired term of any water master so removed. The duties of the water master, as quoted by the trial court from Sec. 3275, as originally enacted, are not found in Sec. 3275, as amended and as set forth above. The duties of the water master are now found in Sec. 3277, Revised Codes, as amended at page 329, Session Laws 1909, and for the convenience of the Court, we also set out the said section here in full:

Sec. 3277. It shall be the duty of said water master to distribute the waters of the public stream, streams, or water supply, comprising his water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten or cause to be shut and fastened, under the direction of the Water Commissioner of his district, the headgates of ditches heading

from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; *Provided*, That any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein, shall, for the purpose of distribution, during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates of ditches having no adjudicated right if necessary to supply adjudicated rights in such stream or water supply.

The above section as originally enacted is also printed in full in the appendix.

The conclusion is inevitable that Sec. 3274, as above set out, must be held to have full application to the Boise River since, to say the least, the waters of this river have been adjudicated as to priority of appropriation and use. This being true, it follows that, under Sec. 3277, as it now exists, and as it existed at the time of the commission of the acts complained of, the defendant water master, E. F. Lakin, under the direction of the defendant water commissioner, Elias Marsters, had direct authority of law for their acts which have been made the subject of complaint in this case.

It is entirely clear from the pleadings in this case, and it will not be denied by counsel for plaintiff, that



the United States has no decreed or adjudicated right in the waters of Boise River. It is true that it has a permit from the State Engineer to divert a certain quantity of the waters of Boise River, but this permit represents nothing more than the right to receive and use that amount of water after all prior appropriators have received the amounts to which they are entitled. In other words, the permit represents merely a right to stand in the water line and to receive water to a given amount should any be left for them when they are reached. (Neilson vs. Parker, 19 Idaho 727, 115 Pac. 488; Speer vs. Stephenson, 16 Idaho 707, 102 Pac. 365; Lockwood vs. Freeman, 15 Ida. 395, 98 Pac. 295. Its position in this case is clearly covered by the provisions of Sec. 3277, Revised Codes of Idaho, as amended by Session Laws 1909, and as set out above, wherein it is specified:

“That any person or corporation claiming the right to the use of the waters of a stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein shall, for the purpose of distribution during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates or ditches having no adjudicated right, if necessary to supply adjudicated rights in such stream or water supply.”

Under this provision of the statute, the water master and the water commissioner not only had authority, but it was their duty to close the headgates of

the United States, since, admittedly, it has no adjudicated right, if in their judgment, they found it necessary to do so in order properly to supply the adjudicated rights in such stream. To hold, therefore, that they had no right to do so is wholly to ignore the statute.

It will be observed that in holding that the complaint stated a cause of action the trial court was led to the conclusion that defendants had acted beyond and without the law, that they were *prima facie* trespassers upon the rights and property of plaintiff, and that the action for damages would lie, through a total misconception of what the law really was. There is absolutely no reason to believe that if he had read the law as it then existed, if he had read Sections 3274, 3275 and 3277, Revised Codes of Idaho, as they had been amended and as printed above, instead of as originally enacted, he would have held as he did, that no presumption arises that the defendants "were acting within the scope of their official authority, or were in the rightful exercise of their official discretion." On the contrary, the statute confers explicit authority to do exactly what was done. There is, therefore, not only a presumption, but a positive assurance that they were acting within the scope of their official authority and discretion, and it follows that they are not liable in damages for carrying into effect the mandate of the law which they were appointed to enforce.

We confidently look to this court to correct the injustice unfortunately done to defendants, as we



believe, through a misconception on the part of the trial court, of the law under which they were acting.

III. *If it be true that at the time the cause of action in this case arose, there was no valid and subsisting decree of the waters of the Boise River, then the trial court would be under the practical necessity of making findings equivalent to the entry of such a decree, before the right of plaintiff to the use of the water of which it claims to have been unjustly deprived could be established. The District Court of the 7th Judicial District of the State of Idaho having before it the question of the ascertainment of the duty of water on the Boise River and the application thereof to the priorities as established, the trial court in this case should have refused jurisdiction of any matter which either directly or indirectly involved the rights of prior appropriators.*

The gravamen of the complaint in this case is the alleged deprivation by the defendants of the use of certain water to which it is alleged the plaintiff was entitled. It is a peculiar fact, but none the less true, that neither the original bill of complaint, nor the supplemental bill of complaint contains an allegation that the water which the plaintiff was using on the day when it alleges its rights were interfered with by defendants was being properly used by it, or properly diverted from the main channel of the Boise River. The case, however, must be regarded, we take it, as having proceeded upon the assumption, if not upon the allegation that plaintiffs were entitled to the water which they were diverting on the day in

question, and that the action of defendant in depriving them of a certain quantity of that water was in effect depriving them of property whose money value could be actually determined and compensated for in damages.

In order, however, that the court might be justified in awarding damages, there must be something more than an assumption that plaintiffs had a right to the quantity of water which they were diverting. If it should happen that they were merely trespassers upon the stream in question and diverting water without authority of law, there would be no warrant for awarding damages, since the law could not hold them injured by being deprived of that to which they had no just title, and certainly when so deprived by officers acting within the scope of their official authority and discretion. It clearly follows, we take it, that in order to establish a right to damages, the plaintiff, in the court below, must have first established its right to the water of which it claims to have been unlawfully deprived. It could not establish that right merely by showing that it was diverting a given quantity of water, since it would only have a right to divert water in any quantity after all prior appropriators were supplied with the amounts to which they were entitled. If, as held by the trial court in this case, there was no decree of the waters of the Boise River "effective for any purpose," it must follow in practical effect that such decree must be made by the court in order to determine whether or not the plaintiff was being deprived



of a right. For how could the court say that the plaintiff was deprived of water the use of which it could justly claim, without first determining the amount which all prior appropriators, from the same course, were entitled to receive on the day in question and then determining the amounts with which they were actually supplied. *Brown vs. Smith*, 10 Cal. 508. If all prior appropriators were receiving the full amount of their rights, and if there was enough water left in the Boise River to supply the right claimed by plaintiff, or to supply the amount which it was actually diverting on the day in question, there would be a basis established for awarding damages, but until that basis was established, the very foundation for the awarding of damages would be lacking.

As hereinbefore set out, the District Court of the 7th Judicial District of the State of Idaho, had decreed the waters of the Boise River, and under the decision of the Supreme Court, jurisdiction had been retained in the said district court to hear further evidence touching the proper duty of the waters of the Boise River upon bench and bottom lands supplied by it. The determination of any question affecting the rights of prior appropriators to the use of the waters of the Boise River at any given time could not properly be made without making all prior appropriators parties to the action. See *McLean, Water Commissioner, et al., vs. Farmers' Highline Canal & Reservoir Co. et al.*, 44 Colo. 184, 98 Pac. 16. The question of fixing the duty of water and the determination of the amount to which all prior appropri-

ators were entitled was then pending before the District Court of the 7th Judicial District of the State of Idaho, and all the necessary parties were before the court. Under the rules which govern in cases of this character, the Federal District Court for the District of Idaho should have refused jurisdiction of this case since it necessarily involves as between the plaintiff and prior appropriators, before plaintiff's right could be established, a determination of the amount of water to which prior appropriators were entitled and the amount they were actually receiving at the moment of the alleged injury.

Where a state and federal court have concurrent jurisdiction, that court which first acquires jurisdiction will retain it to the end.

Sharon vs. Terry, 36 Fed. 337, 1 L. R. A. 572.

Parks vs. Wilcox, 6 Colo. 489.

Where two suits involving to a great extent the same subject matter, are brought in a state and federal court, that court whose process is first served obtains jurisdiction of all questions which legitimately flow out of the subject matter of the case.

Union etc. Co. vs. University of Chicago, 6 Fed. 443.

Parkes vs. Aldridge, 8 Fed. 220.

In re James, 18 Fed. 853

Bruce et al. vs. Manchester, et al., 19 Fed. 342.

Ball vs. Thompkins, 41 Fed. 486.

City of Opelika vs. Daniel, 59 Ala. 211.



See also:

American Association Ltd. vs. Hurst, 59  
Fed. 1, 7 C. C. A. 598.

Hall et al. vs. Ames et al., 190 Fed. 138.

American Ship Building Co. vs. Whitney  
et al., 190 Fed. 109.

IV. *Before the plaintiff is entitled to damages for loss of the use of water for irrigation purposes, it must clearly establish its right to such use. Such right can only be established by showing that after all prior appropriators had been supplied with the water to which they were entitled, there was still sufficient water in the source of supply to furnish plaintiff with the quantity which is was diverting at the time in question and of which it claims to have been unlawfully deprived.*

We have heretofore invited the attention of the court to the fact that there is found no allegation whatever in either the bill of complaint or the supplemental bill of complaint to the effect that plaintiff was rightfully entitled to the water which on the 11th day of July, 1913, it was diverting from the main channel of the Boise River.

“The material allegations in a complaint in an action for damages for injuries to water rights, ditches, or canals, or other works, lands, growing crops, or personal property, do not differ materially from the allegations of a complaint for damages caused from other injuries. The plaintiff should allege his ownership or right of possession

of the property in question.” Kinney on Irrigation and Water Rights, Sec. 1686.

“The allegation of an approved permit from the State Engineer to divert a certain amount of water is not an allegation of any right whatever as against prior appropriators.”

Lockwood vs. Freeman, 15 Ida. 395, 98 Pac. 295.

Neilson vs. Parker, 19 Ida. 727, 115 Pac. 488.

Speer vs. Stephenson, 16 Ida. 707; 102 Pac. 365.

In view of these considerations, we are entirely convinced that the bill of complaint wholly failed to state a cause of action, and is insufficient to sustain the judgment.

Regardless of the fact, however, that the right to this water was not alleged, we assume that damage cannot be predicated upon the loss of water unless the right to its use be first established by competent evidence. This is, we think a general rule which runs through the entire body of the law of damages.

“To entitle a person to damages, there must be an injury which is a violation of a right.”

Parker vs. Griswold, 17 Conn. 288, 42 Am. Dec. 739.

“In order to be entitled to damages for the injury to a water right or to a ditch, canal or other works connected therewith, the person suing



must be the owner of the title to such rights, or must have been entitled to their use.

Kinney on Irrigation and Water Rights,  
Sec. 1661.

Cash vs. Thornton, 3 Colo. App. 475, 34 Pac.  
268.

If the plaintiff on the day in question was a mere trespasser upon the Boise River; if it was diverting water to the use of which it had no right, it would have no standing whatever for coming into court and asking damages for the deprivation of such water to which it was not entitled, but to which the prior appropriators on the river had a just and valid claim.

It will be noticed that this entire case, insofar as plaintiff is concerned, seems to be based upon the theory that it can collect damages for being deprived of the water which it was then diverting, regardless of whether it had the legal right to divert the said water or not.

As heretofore pointed out, the plaintiff has attempted to reject the Stewart decree (Plaintiff's Exhibit "G") as wholly ineffective for any purpose. Let us assume for the moment that this theory may be accepted as correct, and that it can be truthfully asserted that there was at the time in question no valid adjudication of the waters of the Boise River. Let us assume, moreover, that all rights on the river were being exercised under the rule in force in Idaho that such rights may be acquired by actual appropriation and actual application to a beneficial use. Even under this theory, the fact cannot be questioned that

there were 134 appropriators whose rights were prior in time to the right of plaintiff, (some of these being corporations supplying scores of individual users), and that before plaintiff could establish its right to damages, the burden was upon it to show affirmatively that, after all prior rights had been supplied with the water to which they were entitled by virtue of appropriation and use, there was still left in the river the amount of water which plaintiff was actually diverting at the time in question, and for the loss of a part of which it now seeks to be compensated in damages.

Following this line of argument, it became necessary for the plaintiff to show and for the court to determine the amount of water to which each prior appropriator had acquired the right of use, and if the Stewart decree (plaintiff's Exhibit "G") is to be wholly rejected insofar as its findings as to the duty of water are concerned, it was first necessary for the plaintiff to show by competent evidence the proper duty of water and for the court to make a proper finding in this matter before the quantity to which prior appropriators were entitled could be determined, even approximately.

We have heretofore contended,—and we firmly believe, that we have shown the essential correctness of this contention,—that there was at the time of the alleged acts of injury a valid and subsisting decree of the waters of the Boise River. The total amount of water awarded by this decree to those rights prior in time to that of the plaintiff was 2755 second feet.



If this decree was a valid and subsisting decree on July 11th, 1913, we submit that at the very beginning of this case, and as an essential prerequisite to the establishment of the right to damages in any amount, it was necessary for the plaintiff to show that after all prior appropriators had been supplied with 2755 second feet of water from the Boise River, there still remained in the river the amount which plaintiff was actually diverting on the day in question; or if, as indicated above, plaintiff's contention should be upheld—that prior appropriators were not entitled to the 2755 second feet of water awarded them by the Stewart decree (Plaintiff's Exhibit "G"), the burden was then on plaintiff, as an essential prerequisite to the establishment of its right to damages in any amount, to establish, first, the proper duty of water on the lands supplied from the Boise River, second, the number and amount of all prior appropriations, and, finally to show that, after prior appropriators had been supplied with this amount, there still remained in the river for its use the water which it was diverting on the day in question.

An examination of the record will show, however, that plaintiff has made absolutely no proper effort to establish by competent evidence the duty of water from the Boise River, and has allowed this question to go wholly by default, or practically so. To say the least, there is an utter lack of evidence in the record upon which the trial court, this court or any other would be justified in attempting to fix the duty of water from the streams in question. This being true,

it follows that the duty of water as fixed by the Stewart decree (plaintiff's Exhibit "G") must, for the purposes of this case, be accepted as the only criterion by which we may arrive at a determination of the question as to whether, on the date of the alleged injury, there was any water flowing in the Boise River which plaintiff could properly claim the right to divert.

Before proceeding with a discussion of the evidence which was actually presented by plaintiff by way of substantiation of its claim, we desire to quote from the decision of the Appellate Court of Colorado on the question of the necessity of establishing the right, which is claimed to have been violated, at the very threshold of establishing the right to damages.

"The right to the use of water for irrigation purposes is a right of property, the subject of ownership like any other property. Although the manner of acquiring the right of property in the use of water is peculiar, and different from that of other property, such right to use must be determined, like any other property right, upon the ownership. It does not appear that there had been any formal adjudication or decree defining the rights of the parties to the water in controversy. It is declared in the State constitution (Art. 16, Sec. 6) that 'priority of appropriation shall give the better right as between those using the water for the same purpose.' The Supreme Court of this State, in *Thomas vs. Guirand*, 6



Colo. 532, declared 'a true test of the appropriation of water is the successful application thereof to the beneficial use designed,' which decision has been since followed. \* \* \* A judgment for damages for the diversion of water could only be based upon the ownership or right of property in the water and the wrongful invasion of that right."

Cash vs. Thornton, 3 Colo. App. 475; 34 Pac. 268.

The principle enunciated in the foregoing case cannot, we think, be successfully questioned. The right to damages must be based upon the ownership or right of property in the water, and if the plaintiff has not established a right of ownership or right of property in the water being diverted on the date in question, it has established no right to damages whatever.

The record may be searched in vain for any light upon the question of how plaintiff established its right, even in its own mind, to the water of which it claimed to have been deprived. Not a single witness introduced by the plaintiff offered evidence showing, or tending to show, the process by which the plaintiff made allowance, if it did make any, for the prior rights on the river and arrived at the amount which it claimed the right to divert. Its headgates were the highest upon the stream. It had the first chance at the diversion of water. It refused to recognize the authority of the Water Commissioner or of the water master to regulate the amount of water it was entitled to receive. It turn-

ed out such water as it wanted and locked its gates at the desired point so as to prevent interference from any source whatever. It clearly presumed to be a law not only to itself but to all others on the river, since it was in position to take what water it wanted for itself and to send the balance down to the prior appropriators. It is impossible to determine from the record the rule that was followed by the plaintiff in determining how much water it would allow the prior appropriators to receive. It rejected the Stewart decree, (Plaintiff's Exhibit "G") and so clearly it did not allow the older appropriators the amounts carried by such decree. If it did not, did the agents of plaintiff have the authority to determine for themselves and for all other appropriators what the proper duty of water should be? And if they had such authority from whence was it derived? The laws of the State of Idaho and the laws of Congress may be searched in vain for any statute which confers such extraordinary authority. If as held by the trial court the status of the plaintiff on the river is exactly that of any other appropriator, are we not confronted in this proceeding with one appropriator, and a junior one at that, from his point of vantage on the river, assuming to fix for himself and for all prior appropriators the proper duty of water and to regulate its use accordingly; and all this without the authority of any court procedure whatever, and in disregard if not defiance of the administrative officers appointed by the State of Idaho to regulate the distribution of water to those who



have an established right to its use. But here let us examine somewhat the testimony offered.

Mr. George H. Bliss was the project manager of plaintiff's Boise project, and his testimony as to the basis of plaintiff's claim, at the time of the alleged injury, is at least edifying. After testifying that on July 11th, 1913, he was diverting 980.4 second feet from the Boise River, he testified as follows:

We intended to continue taking that amount until the order of the court. We did not base this amount on anything. We just assumed there was no order of the court, that the Stewart decree stood as to priorities simply, and did not carry any amount, and that until there was an order of the court the Stewart decree was void as to amounts. 980.4 second feet delivered at the New York Canal what they required for their lands, and gave us what we required for our lands without any surplus running into the reservoir. That is, that was enough. When we had that we had what we required.

Q. In other words, you took what you required regardless of whether the prior appropriators had what they required or not?

A. We took this amount. That is what we required to properly irrigate our lands on the project, on the proposition that there was no order of the court in effect.

Q. And until there was an order you assumed you had a right to whatever you required for your lands?

A. Yes.

Q. Suppose, Mr. Bliss, that there were only 980.4 second feet in the river at that particular time, do you suppose you could take it all because you needed it all?

A. I do not know what we would have done, of course, under that circumstance, but I was acting under the advice of my counsel in taking this amount of water. (Tr. p. 100).

Again testifying with reference to the basis upon which damage was asserted, Project Manager Bliss testified as follows:

Q. If there was 1710 second feet in the river on July 18th when this order went into effect, and prior rights were entitled to 1619 feet, then upon that basis you certainly were not entitled to 980.4 second feet were you?

A. Not on that basis.

Q. What right have you to say you were damaged in the sum of \$387.20, or any other amount, unless you also state the basis upon which you make that calculation?

A. I made my calculations upon three bases: One is that Mr. Marsters did not have any right at any time on government property, and another was that up to the time he didn't have any right, up to the time of the temporary order or decree, but did have after July 18th.

Q. But in making this calculation, isn't it true that you assumed throughout that you were en-



titled to have the amount of water you were taking on July 11th?

A. That on the assumption that he hadn't any right to take it out at all at any time. (Tr. p. 104.)

Q. Now then, in view of all that, Mr. Bliss, I would like you to tell me just as simply as possible how you arrived at the amount of water which the United States was entitled to use on the 11th day of July, 1913.

A. We assumed that we was entitled to everything, without an order of the court, that is up to a certain amount, that was agreed upon between these attorneys. I think they told me—in discussion with Mr. Stoutemyer—as to what we should keep and what we should let go. (Tr. pp. 98-99.)

From these quotations from the testimony of the principal witness for plaintiff, as well as from the entire body of plaintiff's testimony, as shown by the record, it will be observed that there was a very noticeable lack of candor on the part of the witnesses as to the basis of plaintiff's right which is claimed to have been injured. Mr. Bliss testified that, regardless of prior appropriators, the plaintiff was diverting on July 11th, 1913, the amount of water which it needed to irrigate the lands under its system; that plaintiff's claim for damages was predicated upon a right to divert this amount of water during the entire irrigation season of 1913; and that the Water Commissioner or the water master acting under him, had no authority to regulate in any manner plain-

tiff's headgates and thus fix the quantity of water which it was allowed to divert. And this is the most which could be abstracted from those who testified and who were supposed to be in position to know. The United States although, under the law, regarded as any other appropriator upon the river, having no greater and no lesser rights, was actually represented on this project by agents who assumed the right to take from the river, without let or hindrance all the water it needed, without regard to prior appropriators and without recognition on the part of those officers created by statute for the common protection of the rights of all water users, of any authority to go upon its property or to regulate in any manner its diversion of water from the river.

We insert here a tabulation compiled from the evidence given by the witnesses introduced by plaintiff.

	1	2	3	4	5	6	7	8
	11	2420	261	2159	2755	219	2536	377
	12	2200	312	1888	2755	249	2506	618
	13	2100	344	1756	2755	323	2432	676
	14	1990	435	1555	2755	452	2303	748
	15	1890	464	1426	2755	473	2282	856
	16	1800	478	1322	2755	473	2282	960
	17	1710	487	1233	2755	473	2282	1049
	18	1710	436	1274	2755	473	2282	1008

In the above table:

Column 1 gives the dates from July 11th to 18th, inclusive.

Column 2 gives the measured flow of the Boise River at the Highland Station. This data is taken from Plaintiff's Exhibit "B".



Column 3 gives the measured amounts of water flowing in the government canal on the dates in question. This data is taken from the testimony of plaintiff's witness George H. Bliss. (Tr. p. 89.)

Column 4 is derived from subtracting the amounts in column 3 from the corresponding amounts in column 2, and represents the amounts which on the dates considered were taken down the river for the purpose of supplying prior rights.

Column 5 gives the amounts to which appropriators prior in time to the plaintiff were entitled. This data is taken from the next to the last page of Plaintiff's Exhibit "G".

Column 6 represents the amount of all rights prior to that of the plaintiff which, on the days in question, were being supplied through the government canal. These figures include both the New York Canal rights and the transferred rights and the data is taken from the testimony of plaintiff's witness Project Manager George H. Bliss.

Column 7 is derived from subtracting the amounts in column 6 from the corresponding amounts in column 5 and represents the amounts of water in second feet which on the days in question were necessary to supply rights prior in time to that of the plaintiff.

Column 8 is derived from subtracting the amounts in column 4 from the corresponding amounts in column 7. These figures represent the amounts in second feet which the water passing the plaintiff's

headgates lacked of being enough to supply the prior rights lower down the river.

It will be observed that the average of the amounts in column 8 is 786 and this figure gives us the average shortage in second feet to supply prior rights of the water being taken past the government canal. These figures, it must be remembered, are taken from the evidence of plaintiff's own witnesses. There is, however, the element of return flow and tributary gains to be considered, since it is admitted that these are available for the supply of prior rights. No one knows just what amount of water was available from these sources in July of 1913. Mr. Stewart, the hydrographic engineer, who testified for plaintiff stated (See Tr. p. 132.) that the average return flow of the entire river for July, 1914, was 551 second feet. If we take that as the return flow for the period of shortage of July, 1913, and this would be exceedingly liberal to plaintiff, its own evidence shows that there was still an average shortage in the amount needed to supply prior rights of the difference between 786 and 551 or 225 second feet.

In other words, plaintiff has shown by its own evidence not only that it was deprived of no right in the period between July 11th and 18th, inclusive, but that during this period the prior appropriators were actually short an average of 225 second feet of the amounts to which they were entitled.

We make no discussion of the days on which the defendants controlled plaintiff's



headgates after July 18th, for the reason that on this date the court having jurisdiction of the question of the rights on the river made its temporary order or decree for the season of 1913. Even under the mistaken view of the law which led the trial court to hold that defendants had no right to regulate plaintiff's headgates prior to July 18th, there can be no contention that he had no such right after that date or that he could be held liable in damages for an honest performance of his duties under the decree of the court. As to the period between July 25th and August 10th, it is admitted that there was plenty of water for all because of rains which raised the river (See Tr. p. 91.) and as to the period after August 10, or rather after July 31st, there was no evidence offered as to the amount of water actually received by the plaintiff.

In addition to the showing made by the data compiled above, taken from the testimony and exhibits of plaintiff, we desire to invite the particular attention of this court to certain other testimony offered by one of the witnesses for plaintiff. This testimony shows conclusively and affirmatively that on the 11th day of July, 1913, when defendants first raised plaintiff's headgates, the prior appropriators on the river were not receiving through their canals the amounts of their decreed rights.

Mr. Stewart, who qualified as expert hydrographic engineer, testified that on July 11, 1913, he measured practically all of the canals on the Boise River, taking out water below the government diver-

sion dam for the purpose of determining the exact amount of water which on that date they were diverting from the river. He mentions a few cases in his direct testimony where he claimed the canals were diverting more than their decreed rights. On cross examination he admitted that there were many canals which according to his measurements were diverting less than their decreed rights. At pages 133-4 of the Transcript, the following significant testimony is found:

“I didn’t say anything about the canals drawing much less than their right under the Stewart decree. The aggregate of the discharge in the canals measured was 1639 second feet, and the aggregate of the Stewart decree for these rights was 2133, or 77 per cent. of the Stewart decree. Including the old New York right, there were 403 second feet of the small canals that I didn’t measure. I don’t know whether they had all the water they were entitled to or not. The statement shows a difference of between 1639 and 2133 second feet which these canals were taking less than their decreed rights under the Stewart decree.”

Mr. Stewart testified that he measured all the canals on the Boise River with the exception of some few of the smaller canals whose rights aggregated 403 second feet. These canals were measured at the point of intake from the river. The measurement, therefore, included all the water taken from the river by such canals and must of necessity have included



such water as was allowed to pass down the river below the government diversion dam, together with all accretions below that point whether from return flow or tributary gains. The testimony of Mr. Stewart shows, therefore, that on the 11th day of July, 1913, the appropriators prior in time to the plaintiff were actually diverting from the Boise River 496 second feet of water less than the amount to which they were entitled, even allowing them only 77 per cent. of the Stewart decree. If this calculation and measurement had been made on the basis of the full rights under the Stewart decree, it will be seen that the shortage would have been 644 second feet. Considering in this connection the canals which were not measured by Mr. Stewart, and the fact that the water in the river decreased rapidly in the days between July 11th and July 18th, as shown by Plaintiff's Exhibit "B", it must be admitted that we have a result which very closely corresponds with and corroborates that deduced from the compilation above, wherein it was shown that the average shortage to prior rights during this period was 786 second feet.

It follows, without further argument that plaintiff has not established a right, neither has he shown a violation of a right and any award of damages based upon such evidence is clearly erroneous and unjust.

V. *Before the plaintiff is entitled to damages for loss of the use of water for power development, it must clearly establish that the act complained of*

*has resulted in an actual loss of power. If it should appear that by reason of the act complained of more power has actually been developed than would have been the case if the act had not been committed, the plaintiff has entirely failed to establish any ground whatever for the award of damages.*

The record shows that the plaintiff has a power plant near the point of its diversion dam upon the Boise River, and that it uses the water flowing in the natural channel of the Boise River for the development of electric power. The record further shows that about a mile below the point of diversion, the plaintiff has certain waste gates, which, when open, permit the water from its canal to flow back into the Boise River. It was shown in the evidence that after defendants had assumed control of the headgates of plaintiff, they measured the amount of water which was allowed to pass the waste gates, at or near the said waste gates, and that during the time they were in control of the system, a certain amount of water was regularly allowed to waste back into the river through these gates. There is some evidence in the record showing that this waste was in part unavoidable, owing to the fact that the waste gates could not be tightly closed and all the water running through them shut off. (Tr. p. 124.) The agents of the plaintiff appear to have kept a record of the amount of water thus wasted back into the river from August 11th, 1913, to October 3rd, 1913, and to have made certain calculations showing the increased power which might have been developed with this water



which wasted through the gates had it been allowed to run through the wheels of the power plant near the diversion dam.

It is clear, however, that the acts of the defendants must be regarded in their entirety, and before a judgment for damages can be legally awarded because of loss of water for power purposes, it must be shown affirmatively that the act of defendants deprived plaintiff of water, which, without that act, would have been used for power development.

Mr. Bliss, the project manager, testified that by the act of defendants on July 11th, 1913, 719.2 second feet of water, which, prior to the lowering of plaintiff's headgates had been flowing in its canal, were sent on down the river and thus passed through plaintiff's power plant. (Tr. p. 87.) The witness, as hereinbefore quoted in this brief, claimed to be diverting on July 11th, the amount of water which the lands under the project then needed, and the inference is entirely clear, even though not fully established by the record, that the project manager would have continued to divert the same amount of water throughout the season. The estimate of the damage caused by the defendants' acts was based upon the supposition that the plaintiff would have been entitled to continue using, throughout the irrigation season of 1913, the amount being diverted on July 11th, 1913.

There were fifty-four days intervening between August 11th and October 3d, 1913, including both of these dates. If the act of defendants caused 719.2

second feet of water to be available for power development purposes, over and above that which would have been available had the act complained of not been committed, and the plaintiff be supposed to have been given the use of that same amount of water for each of the fifty-four days in question, it follows that during the entire period over which the computation made by plaintiff was based, the plaintiff was, by the acts of defendants, given 38,836.8 second feet of water for power development more than it would have received had not the action in question been taken.

The computation made by plaintiff's agent (see Plaintiff's Exhibit "H",) shows that all the water measured at the waste gates, and of the use of which they claim to have been deprived for power purposes, was 3552 twenty-four-hour second feet. Deducting this latter amount of 3552 twenty-four-hour second feet, of which plaintiff claims to have been deprived, from 38,836.8 twenty-four-hour second feet, which, as shown above, was made available for power development purposes by the acts of defendants, and it will be seen that the act of defendants resulted in giving to plaintiff 35,284.8 twenty-four-hour second feet of water for power purposes more than, by its own admission, it would have had if it had been allowed to continue diverting for purposes of irrigation the amount of water which it was taking on July 11th, 1913.

If it be true, as testified by witnesses for plaintiff, that 3552 twenty-four-hour second feet additional



water would have resulted in the development of power which might have been sold for the sum of \$259.22 (See Tr. p. 108), it must also be true that the additional use of 35,284.8 twenty-four-hour second feet of water must have resulted in the development of power for which it undoubtedly received the sum of \$2,574.98. It thus appears that the acts of defendants, insofar as the development of power is concerned, must be regarded as a gain to the plaintiff of \$2,574.98, rather than a loss of \$259.22.

It appears to us that it would be clearly erroneous, in any view of the case, to charge the defendants with the loss of power which resulted from their acts, without at the same time crediting them with the gain of power which resulted from the same acts. When this has been done, the plaintiff is clearly seen to have been enabled to manufacture more power as a result of defendant's acts of interference with its system than would otherwise have been the case, and it would be contrary to all principle to award damages upon such a showing.

If plaintiff's agents had been willing to recognize the authority of defendants, under the statutes of the State of Idaho, to regulate the use and distribution of the waters of the Boise River, if they had been willing to co-operate with them in securing the proper adjustment of their gates at the point of diversion, if they had been willing to occupy, as they must do, the same status as other appropriators on the river, instead of attempting to be a law unto

themselves and all prior appropriators, none of these troubles need have occurred and no claim need have arisen for loss of water for power development or for any other purpose.

VI. *Where plaintiff diverts water for sale or rental, the amount of money received depending upon the measured quantity of water actually delivered, it must, before it can establish a right to damages for the loss of a part of its water, show by competent evidence that the water would have been actually sold if not interfered with and the purchase or rental value realized.*

In this connection, we desire only to invite the attention of this court to the fact that there is absolutely no testimony in the record to the effect that plaintiff could have sold for irrigation purposes the water of which it claims to have been deprived, even though it had been allowed to divert the same through its canals. George H. Bliss, the project manager, gave it as his belief that the water could have been sold, but there is no showing that any single settler was under contractual obligations to take any part of this water, or that any single settler would have purchased more than the amount he actually did receive, even though plaintiff had been allowed to divert the additional water into its system.

The plaintiff is conducting an irrigation system under which it sells water at a given price per acre foot, and until it produces evidence to show that the water claimed by it could have been sold to actual users who would have paid therefor, the plaintiff



has wholly failed to establish a basis of damages for deprivation of such water.

VII. *In an action for damages resulting from the loss of water damages can not be awarded upon evidence which is wholly insufficient and inconclusive to establish the right claimed to have been violated or the amount of the loss.*

From a careful inspection of the record, we believe it will appear to the court that no sufficient evidence is to be found in the record to establish even an approximation of the actual loss to plaintiff, even though it should be conceded that some loss was actually sustained.

Where damage has been sustained, its amount must be computed according to reasonable rules. It cannot be arrived at by any haphazard method, or by a process of approximation which amounts to guess work pure and simple. Until the extent of the right of plaintiff to the use of water on the days in question has been established, we contend that any attempt to determine the value of this right, which it claims to have been violated, could amount to nothing more, or better, than a worthless guess. As heretofore pointed out, there is absolutely no evidence in the record of this case which shows, or which tends to show, the extent of plaintiff's right, and to attempt, therefore, to fix its damage at a definite amount is clearly violative of all the rules of the law of damages.

It is conceded that there are classes of cases in which the amount of the loss or injury cannot be de-

terminated with exactness, and that in such cases the court or jury is allowed to fix the measure of damages as nearly as is possible consistent with justice; but even in all such cases, the principle that the right, claimed to have been violated, must first be established still obtains, and until that right has been established no sum can be assessed as compensatory damages under any theory whatever.

It seems to us, therefore, that even though the trial court, as we have shown, from a mistaken reading of the law which was in force and effect at the time of the commission of the acts complained of, believed, as he evidently did believe, that defendants had no right or authority to interfere with the head-gates of plaintiff and regulate the amount of water which it was diverting, its damages were nominal only, and could properly have been made nothing more than nominal under the evidence adduced.

“The amount of loss is as much to be proved by the plaintiff as the fact of loss. Consequently where the injury is proved but there is no evidence as to the amount of the loss, the plaintiff is entitled to nominal damages only.”

Murray vs. Pannaci, 130 Fed. 529.

Seaboard Mfg. Co. vs. Woodson; 98 Ala.  
378, 11 So. 733.

Eldridge et al. vs. Gorham, 77 Conn. 699;  
60 Atl. 643.

Pennington vs. Lewis, 4 Pennew. (Del.)  
447; 56 Atl. 378.



Richmond Hosiery Mills vs. West. Union Co., 123 Ga. 216; 51 S. E. 290.

Freeze vs. Crary, 29 Ind. 524.

Roberts vs. Minneapolis Treshing M. Co., 8 S. D. 579; 67 N. W. 607.

Hudson vs. Archer, 9 S. D. 240; 68 N. W. 541.

Williams vs. Brown, 76 Ia. 643; 41 N. W. 377.

The defendants in this case are poor men. At the time of their alleged injury to the plaintiff they were the duly appointed and acting officers of the State of Idaho for the distribution of the waters of the Boise River to those entitled to its use. Their duty could be performed only through the exercise of judgment and discretion. There is absolutely no evidence that they acted from any but the most proper official motives; much less is there any evidence that they acted in any manner from malice or a desire to injure the plaintiff in its rights. It does appear from the record that they acted throughout under the advice and instruction of the Attorney General of the State of Idaho, who construed Section 3277, Revised Codes of Idaho, heretofore quoted in full in this brief, as authorizing defendants to take the identical action which was taken by them. Every intendment of the law should, therefore, be in their favor, and, we submit, they should be held liable in compensatory damages only when it has been clearly shown that they acted wholly without and beyond the scope of the law or with malice toward the plaintiff. When the actual provisions of the law are read

and applied to the case, it will be found that they acted within their official authority and discretion and that there is no ground whatever for holding them personally liable to the plaintiff in any amount. But even under the mistaken theory of the law upon which this case proceeded, it seems clear that nothing beyond nominal damages should have been awarded by the trial court. And nothing beyond nominal damages can, we believe be sustained by this court, in view of the character of the evidence produced, even though, as seems most improbable, this court should affirm the findings to the trial court to the extent of holding that a proper basis for damages in some amount has been established.

The view of the law adopted by the trial court was erroneous, as has been clearly shown, and all the proceedings, the findings and decree based upon this view of the law were equally erroneous and indefensible. Upon this presentation of the matters involved we submit our case to this court in the confident expectation that the correct interpretation of the law will be declared, and the manifest injustice done to the defendants (Appellants here) be corrected.

Respectfully submitted,

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Attorney General, State of Idaho

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Attorneys for Appellants.

E. G. DAVIS,  
Of Counsel.



## APPENDIX.

(We print here Sections 3274, 3275 and 3277, Revised Codes of Idaho as they were originally enacted and as they were quoted from by the trial court by way of establishing his view of the law applicable to the case. The parts quoted by the court and which were omitted from these sections as they were re-enacted in 1909 are here printed in italics, in order to afford easy verification of our claim that what the court quoted and cited as the law was not the law at that time. These sections as they existed at the time are quoted in full in this brief.)

Sec. 3274. The Board of Irrigation shall divide the State into water districts, said water districts to be so constituted as to secure the best protection to the claimants for water, and the most economical supervision on the part of the State. *The water districts which shall be first created are those which will embrace the streams whose waters have already been allotted by the District Court, the distribution of which shall, by the provisions of this chapter, be under the control of the water commissioners of the divisions in which such stream or streams are situated. Other districts shall be created from time to time as the appropriations and priorities thereof from the streams of this State shall be confirmed or adjudicated; Provided, That when any company or association owning irrigation works whose water supply is not distributed under a sale or rental thereof, shall petition the water commis-*

sioner to appoint a water master to take charge of the distribution of the water from such works, such water master shall be appointed, and he shall deliver to each user the quantity of water to which he may be entitled; and such water master so appointed shall be paid for such services in the manner provided in Sections 3279 and 3280; *Provided*, In the case of a stream whose waters have been allotted, when the distance between the extreme points of diversion of such stream is not more than thirty miles, the users of water from such stream may elect a water master to distribute the water of such stream, and fix his compensation therefor in the manner provided in the following section for the election of water masters.

Sec. 3275. For each water district created under the provisions of this chapter, there shall be appointed, on or before the first day of March of each year, one water master, who shall be appointed by the commissioner of the division in which the water district is situated. Each water master shall hold office for one year, or until his successor is appointed and shall have qualified. The said water commissioner may, at any time, remove any water master for failure to perform his duty as such water master, upon complaint in that respect being made to him in writing.

Before entering upon the duties of his office, said water master shall take and subscribe an



oath before some officer authorized by the laws of the State to administer oaths, to faithfully perform the duties of his office, and shall file with the Clerk of the District Court in the county in which said water master resides, said oath and his official bond in the penal sum of five hundred dollars, with not less than two sureties, to be approved by the judge of the probate court of the county in which he resides, and conditioned for the faithful discharge of the duties of his office; *Provided, That any vicinity or neighborhood, the inhabitants of which use the waters of any ditch, stream or spring for the purpose of irrigation, or have or claim a common right to the waters of any ditch, stream or spring for such purpose, provided the waters so claimed or used have not been allotted to the individual users thereof, shall constitute a water district, and a majority of such water users having such common right may, annually, on the third Monday of February, at a meeting of such inhabitants, elect a water master for such district whose duty it shall be to superintend the distribution of such waters among those having such common right, or accustomed to participate in such common use. The water master of the district, or if there be no water master, or upon his failure or neglect to do so, any six residents of the district entitled to such common right, must give three days' public notice of the time and place of such election, by placing printed or written notices thereof in*

three of the most public places in the district. Said meeting must be opened at ten o'clock in the forenoon, and the majority of those present who are entitled to such common right may organize the same and determine the manner of such election, and whether the same shall be by ballot or otherwise.

The water master must execute to the county in which his district is situated, and file in the office of the county recorder for the benefit of any person who may be injured by his wanton or illegal act or omission as such, a bond in the sum of five hundred dollars, with two sufficient sureties which shall be approved by the judge of the probate court of the county in which such district is situated, and conditioned for the faithful and impartial discharge of his duties as water master of his district, and any person so injured may have an action on such bond in his own name for his actual damages. Such water master may employ one or more deputies as authorized by the inhabitants of his district claiming such common right as aforesaid, and he is liable for their wanton or illegal acts upon his official bond, and before entering upon their duties the water master and his deputies must take and subscribe an oath, before any magistrate, to faithfully discharge the duties of their office, and they may receive such compensation, to be paid in such manner as may be agreed upon with such users, and shall have the same power as the water masters



appointed by the water commissioners under the provisions of this section. Said elected water master shall be under the direction and authority of the said water commissioner.

Such water master and his deputies must regulate the distribution of water among the several ditches of his district, and among the several water users who are entitled and accustomed to the use thereof, according to their respective rights and necessities, and when the quantity of water is not sufficient to afford a full supply to those entitled or accustomed to use the same, according to the usage of the district, such water master and his deputies must regulate the quantity used by each person, and the time at and during which each person may use the same; and such customs or usage must be upheld by the said water commissioners and by the courts of the State, when such customs have for their object the economical distribution of the waters of such district; *Provided*, Nothing in this section must be so construed as to *interfere with the vested rights of individuals, companies or corporations, or in any manner to interfere with the rights of individuals, companies or corporations, to the use and control of water, the right to the use of which is or may be their private property.*

Sec. 3277. It shall be the duty of said water master to divide the water in the natural stream or streams of his district among the several ditches taking water therefrom, according to the

prior rights of each respectively in whole or in part, and to shut and fasten, or cause to be shut and fastened, under the direction of the water commissioner of his water district, the headgates of ditches heading in any of the natural streams of the district, when, in times of scarcity of water, it is necessary so to do by reason of priority of rights of others taking water from the same stream or its tributaries.





# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

ELIAS MARSTERS AND E. F. LAKIN, APPELLANTS,

VS.

UNITED STATES OF AMERICA, APPELLEE.

## BRIEF OF APPELLEE

*Appeal from the United States District Court for the District  
of Idaho, Southern Division.*

J. L. McCLEAR,

*United States Attorney, District of Idaho.*

J. R. SMEAD,

*Assistant U. S. Attorney, District of Idaho.*

B. E. STOUTEMYER,

*Counsel, U. S. Reclamation Service.*

*Attorneys for Appellee.*

CAPITAL NEWS JOB ROOMS, BOISE

Filed

FEB 11 1916

F. D. Moulton,





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### STATEMENT OF THE CASE.

The Boise river is a stream flowing through Southern Idaho, from which the United States Reclamation Service diverts water for the irrigation of what is known as the Boise-Payette Project.

There are 134 appropriators whose rights are prior in time to the rights of the United States.

There is no decree of any Court fixing the amounts of water to be taken from the Boise river, respectively, by the various appropriators. In 1902, an action was commenced in the District Court of the state for this purpose and a decree was entered in such Court in January, 1906. From an order denying a motion for a new trial in that cause, an appeal was taken to the Supreme Court of the State of Idaho, on the hearing of which appeal the Supreme Court reversed such judgment and sent the case back to the District Court for a new trial.



Farmers Co-Op. Ditch Co. vs. Riverside Irrigation  
District et al, 16 Ida. 525, 102 Pac. 481.

As the matter now stands, the only thing adjudicated is the dates of priority, that is to say, the order in which the various appropriators shall be allowed to take water from said river. The *amount* which each may take in his turn is in no wise decreed or determined. The United States was not a party to this action. No action has ever been brought in any Court to determine the amount of water to which the United States may be entitled as against the various prior appropriators. •

The case in State Court, just referred to, has been pending therein ever since the reversal by the Supreme Court and during each season the Court has, by agreement among the parties, made a temporary order covering the latter half of the irrigation season, to the effect that each party shall be allowed in his turn six-tenths of a miner's inch of water for each acre of land by him irrigated.

During the irrigation season of 1913, up to July 11th of that year, the United States and these prior appropriators agreed among themselves as to the amounts of water which they would take from the river. On July 11th appellants, assuming to act as appointive executive officials of the State of Idaho, went upon the property of the United States and proceeded to turn out of the Government canal the greater portion of the water which the Reclamation Service was taking through said canal for the purpose of irrigating the lands in said Boise-Payette Project. At the time of so doing, there was no statute or other law in effect in the State of Idaho authorizing either a water commissioner or a watermaster to determine how much water should be taken from a given

stream by a given appropriator, except certain statutes effective only on the condition precedent that there should be as to such stream and such water rights therein a decree of a Court of competent jurisdiction fixing the priority of such water rights and the amount of water which each appropriator in said stream should be allowed, in his turn, to divert.

Said appellants continued so to interfere with the United States water right from July 11th until the end of the irrigation season. To do this, they placed armed guards at the waste gates who took turns in maintaining an armed watch thereover and who housed themselves and prepared their meals in a government building standing on government land adjacent to such waste gates. In initiating said interference with the government's waste gates, appellants went upon the government property referred to, cut various and sundry locks by which the gates in question were fastened in place, in order that they might be able to raise such gates, and so regulated the flow of water in the government canal as they chose.

No resistance was offered to these actions although protests were made, but the United States authorities in charge of the Reclamation Service, on July 12, 1913, filed in the District Court of the United States, for the District of Idaho, a bill in equity praying that appellants be enjoined from assuming and maintaining such control over the property of the government, and praying, as supplementary thereto, for damages which might be incurred by the government on account of such interference with its water rights and other property.

Upon a trial on the merits thereof, had on the 10th day of June, 1915, the learned Judge of said District awarded damages to the United States, appellee herein, in the sum of one



thousand (\$1000.00) dollars. From such judgment this appeal is prosecuted by defendants in that action, appellants here.

## ARGUMENT.

In presenting our argument, we will follow the same general method of subdividing the same as that adopted by appellants, except that we will, in some instances, group two or more of appellants' subdivisions under one head herein, as we shall designate as our argument proceeds.

### I.

Under this, the first subdivision of our argument, we will discuss the same phase of the case dwelt upon in the first subdivision of appellants' brief, which, in that brief, commences at the bottom of page 18.

The entire argument there advanced by appellants is premised upon the proposition that at the time their actions complained of by appellee were committed, there was a valid and subsisting decree adjudicating the water rights in the Boise River of the respective water users thereof. In fact, the greater portion of the argument in appellants' brief, not only in the first subdivision thereof, but in other portions of the brief as well, is predicated upon the same proposition. In support of their argument, appellants refer this court to *Farmers Co-Operative Ditch Co. vs. Riverside Irrigation District, et al*, 14 Ida. 450, 94 Pac. 761, and to the case of the same title in 16 Ida. 525. Appellants contend that in the latter of the two opinions cited (16 Ida. 525) the Supreme Court of Idaho specifically affirmed the respective rights and priorities of the various water users whose rights were litigated in that case.

That the findings of the trial court in that case were neither reversed or modified by the opinions of the Supreme Court of Idaho above cited. That the result of the Supreme Court's order that a new trial be had for the purpose of determining the "duty of water" was merely to the effect that jurisdiction was retained in the lower court *to modify* its findings in that regard. That by its opinions the Supreme Court intended that the "status of the waters of the Boise river should be regarded as absolutely fixed and adjudicated according to the decree rendered by the trial Court in the case referred to, unless, and until, the said trial Court should modify the said decree after the taking of further evidence on the question of the duty of water."

In other words, appellants advance the proposition that the Supreme Court affirmed the findings and judgment of the trial court, but sent the case back with the suggestion, merely, that the Trial Court take further evidence in the matter of the duty of water and that he change his findings and judgment in that regard if, in his opinion, it should seem proper to do so. At the threshold, such a procedure, if introduced, would be a novel departure indeed. That a Court of last resort should affirm the decree of a lower Court, and, in the same breath, confer upon that lower Court the power to reverse or modify in its discretion the self same decree, we submit to be a thing unheard of in the annals of jurisprudence. Stripped of all verbiage and argument, the fact is that in the opinion referred to, in 16 Ida. 525, the Supreme Court of Idaho set aside the trial Court's findings as to the "duty of water" in Boise river and ordered that a new trial be had, which new trial should be confined to an inquiry into that phase of the case. By so doing, the *decree* of the lower Court was also set



aside, so far as it purported to fix such duty of water. Appellants have quoted certain language used by the Supreme Court of Idaho, in support of their contention on this phase of the case. Referring to the earlier opinion, 14 Ida. 450, a reading thereof will reveal that it involved an appeal taken by the Nampa & Meridian Irrigation District, one of the defendants in the lower Court, and that the questions discussed and decided by the Supreme Court do not in any manner touch upon the "duty of water" or the amount of water to which any, or all, of the various appropriators should be respectively entitled to use. The Court finds, merely that so far as the questions presented by the appellants are concerned, those questions should be resolved against the appellants and that the lower Court's action should be affirmed *in that respect*.

"There was no error in the action of the court *in this respect*. The judgment should be affirmed and it is so ordered." (Italics ours.)

Farmers Co-Op. Ditch Co. vs. Nampa & Meridian Irr. Dist., 14 Ida. 450, at 461.

In the latter opinion, 16 Ida. 525, the Supreme Court says at page 527:

*"Judgment affirmed except as to the duty of water, and as to that issue reversed and a new trial ordered."*

and on page 538,

"The question as to the duty of water under those ditches and appropriations will be re-tried. On a re-trial the Court will hear such competent evidence as may be produced touching the duty of water to be applied to lands in Boise Valley and lying under the various canals taking water from the Boise River. The Court in its decree should also determine and decree what lands are bench and what bottom lands."

And in explaining its reasons for setting aside the trial Court's decree and ordering a new trial, the Court, at page 533, says:

"The appropriator is allowed to divert water from the stream sufficient to cover the reclaimed acreage under his canal at the rate of one inch or one and one-tenth inches per acre, according as the lands may be bench or bottom lands. The evidence introduced in this case for the purpose of establishing the duty of water under these several canals and appropriations was practically all purely guess-work and of the most unsatisfactory character. One after another of these witnesses testified that he had been using 'about' a certain volume or quantity of water on his land, and he 'thought' it was necessary to have 'about' so much for the irrigation of his land. In nearly every instance when the witness was asked if he had ever measured the water and made tests as to the actual quantity of water used on a given tract of land, he said that he had not. A fair example of the evidence given in this case is that of a witness who testified that he had lived in Boise for forty years, and that he had been acquainted with the irrigation ditches that were built in the early 60's. He said: 'I don't know anything about inches of water \* \* \* I have made no investigation to determine how many inches of water it would take to irrigate an acre of land, either in vegetables or grass land.' The witness followed this testimony by saying he would judge it would take about an inch to the acre. This was true with practically all the witnesses in the case. The trouble with the whole line of evidence given on this subject is that it was for all practical purposes worthless, and was not founded on any actual measurements or tests, but was purely guess-work as to the volume of water that had been used by the several witnesses. What evidence was given from actual tests and measurements shows a less quantity of water necessary per acre and consequently a higher duty for the water. Few of the witnesses appear to have ever seen water measured, or to know how large a stream of water and what grade or pressure it would take to measure a given number of

inches. The first real and satisfactory tests or measurements that appear to have been made were made subsequent to the decree in this case in attempting to distribute the water in conformity therewith. Since the decree was entered, the water commissioner and water-masters under him have made numerous tests and measurements, and a great number of affidavits have been filed on motion for a new trial. By these affidavits, made by the water commissioner and water-masters and other expert witnesses, it appears that it will be impossible to actually irrigate anything like as large an acreage under the decree in this case as had been previously irrigated by the several appropriators of the waters from this stream. It also appears from the affidavits that it will not be necessary or essential to apply as much water to the lands as this decree calls for."

Following on from the last quoted portion of that opinion on page 534 appears the following:

"We feel satisfied, however, from an examination of these affidavits and the whole record in this case, that a higher duty may be obtained from the water than that of an inch and an inch and one-tenth, respectively, per acre as provided for in this decree."

And again on page 535:

"It is the policy of the laws of this state, and it has been so declared from time to time by this court, to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes."

And in its opinion on a petition for re-hearing, which opinion appears immediately following the opinion from which we have just quoted at length, the Court states that it has already set aside the findings of the lower Court to the effect that the duty of water in Boise Valley shall be, "for bench lands, one inch per acre; for bottom lands, one and one-tenth inches per



acre." See 16 Ida. 539. The Court then states that the former opinion, namely, the opinion as to which the rehearing has been asked, is modified in this, that the new trial theretofore ordered shall determine the duty of water on bench and bottom lands only, exclusive of the irrigation of certain town lots, street sprinkling, etc. At the close of this opinion on petition for re-hearing, the Court says:

"We are satisfied from an examination of the record in this case that the maximum amount of water to be allowed each appropriator *is too much and in excess of the amount that may in any event be necessary* for the successful irrigation of the lands under consideration."

It seems to us that the foregoing should set at rest any controversy as to what the Supreme Court of Idaho decided in the opinion from which we have quoted. However, since, as we have before indicated, the greater portion of appellants' argument is based upon their contention that the opinion just discussed affirmed the findings of the lower Court, it may be proper to inquire into the effect of the granting of a motion for a new trial. Beyond any doubt the Supreme Court of Idaho granted a new trial in the authority under discussion. A motion for a new trial was made by several of the litigants in the case, was denied in the lower court, the appeal was taken from such order denying a new trial, and the Supreme Court reversed that order and by its mandate commanded the trial Court to hold such new trial.

A new trial is strictly a statutory provision.

People vs. George, 3 Ida. 108, 27 Pac. 680.

Benjamin vs. Stewart, 61 Cal. 608.

(The California statute is identical with that of Idaho.)

A new trial consists in the re-examination of an issue of fact.

Idaho Revised Codes, Sec. 4438; Cal. C. C. P., Sec. 656.

People vs. George, *supra*.

"The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes," etc.

Ida. Revised Codes, Sec. 4439.

From the last citation, it plainly appears that the effect of the granting of a new trial is to vacate and set aside the former decision. Accordingly, the Supreme Court of Idaho in *Caldwell vs. Wells*, 16 Ida. 459, 101 Pac. 812, has said:

"An application for a new trial is directed to the verdict of the jury or the decision of the Court. \* \* \* \* \* The judgment is based upon the verdict, or the decision of findings of the Court. \* \* \* \* \* When a new trial is granted, the finding or verdict is set aside, *in which case the judgment must also fall.*"

The opinion from which this last quotation is made was rendered just fifteen days prior to the opinion in *Farmers Co-Op. Ditch Co. vs. Riverside Irrigation District*, hereinbefore discussed, and relied upon by appellants. In view of the rule just quoted, which was the settled law of Idaho at the time the new trial was ordered for the purpose of determining the duty of water, it follows conclusively that in ordering such new trial the Supreme Court of Idaho fully intended to set aside the trial Court's findings in that regard and to *reverse the judgment theretofore entered* touching the duty of water. That judgment being thus vacated, there was not, at the time when appellants assumed to regulate the amount of

water to be diverted by the United States Reclamation Service, any judgment or decree in existence determining the amounts to be taken from Boise river by the various appropriators or any of them. It is not contended that any judgment or decree ever was or has been made in that regard other than the judgment which was reversed and set aside by the Supreme Court's order that a new trial be had. Therefore, appellants acted entirely upon their own initiative and were mere tortfeasors who trespassed upon the property of the United States without any authority whatever. Had the lower Court itself attempted to put into force its former decree it could have been prevented from so doing and compelled to follow the mandate of the Supreme Court by an original action in that Court.

American Placer Co. vs. Rich, 8 Ida. 570, 69 Pac. 280.

Kroetch vs. Morgan, 10 Ida. 172, 77 Pac. 19.

The contention of appellants, therefore, comes to this, that the watermaster, a sub-officer of one of the Executive Departments of the State Government, was authorized arbitrarily, and at his discretion, to put into operation a decree which had been reversed and vacated, and which the lower Court itself had no power to enforce and no warrant in law to consider.

It follows from what has been said that the trial Court in the case at bar was eminently correct in saying (Trans., p. 19) that the opinion of the Supreme Court of the State of Idaho fixes *only* the dates of appropriation among the water users on Boise river; that is to say, that the opinion in question determines the order of priority among the various water users and



reverses the judgment in every respect in which it purported to fix the amount of water per acre necessary for irrigation purposes in Boise Valley, or the various amounts to be allotted to the respective water users.

We submit that appellants' contention in this regard should be held to be without foundation.

## II.

Under the second sub-division of their argument at page 27 of their brief, appellants insist that their acts were justified by the statutory law of the State of Idaho in force at the time said acts were committed. In support thereof, appellants print in full, on pages 28 to 31 of their brief, Sections 3274 and 3275 of the Idaho Revised Codes, and on pages 32 and 33, Section 3277 thereof, all as amended by the Session Laws of Idaho of 1909 at page 327 thereof.

Section 3274 provides for the division of the State into water districts. Section 3275 provides, among other things, that the water users within one of such water districts may elect a watermaster for the district. Section 3277 provides that said watermaster shall have certain powers and duties in the matter of the distribution of the water supply of such water district. Merely a casual reading of these sections discloses that they, or any one of them, have no application whatever to any streams or other source of water supply except such streams or sources of supply as of which the priorities of appropriation *and use* have been adjudicated by courts of competent jurisdiction. The closing paragraph of Section 3274 as amended is as follows:

“Provided, that this section shall not apply to streams of water supplies whose priorities of appropriation and

use have not been adjudicated by the courts having jurisdiction thereof."

That is merely to say, that no water district can be lawfully created except on condition that the public stream or other source of water supply, to which said district is appurtenant, shall have been the subject of a valid judicial decree. It will be further noted that such a decree must establish not only the priorities, that is to say, the chronological order, of various appropriations, but also the priorities of *use*. The priority of use of the waters of a stream means nothing more nor less than that the holder of such priority shall have the right to use a *specified amount* of such water before the next later appropriator can claim any right of use whatever in such waters. It is fully apparent from the authorities cited in the first division of our argument that in the case at bar nothing has been adjudicated concerning the waters of Boise river with the bare exception of the chronological order of appropriation therein. As there pointed out, the Supreme Court of the State reversed the judgment of the lower court and sent the case back for a new trial for the express purpose of determining the "duty of water," the dates of the various appropriations being fixed; that is, the *order* in which the various appropriators were to be allowed to use water from the river. A new trial was ordered to determine how much water should be decreed to be necessary to irrigate one acre of "bench" and one acre of "bottom" lands, respectively. That new trial, as shown by the whole record in this case, has never been had. When it shall be had, a decree will be entered fixing the amount of water to be taken from Boise river for each acre of land owned by the appropriators along the river. That decree will also provide in what order such appropriators shall

divert such water from the river. That is, in effect the decree will establish who may first divert water from the stream for irrigation purposes and how much water he will be entitled to take for each acre of land by him owned. The total amount of water to which he will be thus entitled will be arrived at by multiplying the amount per acre named in that decree by the number of acres of land by him owned. Thus, the decree will fix in each appropriator not only his priority of *appropriation*, but also his priority of *use*. When this is done, Section 3274 may properly be relied upon by the Board of Irrigation as authorizing it to establish water districts in the territory irrigated by the Boise river. But until such a decree, establishing *both* the priority of appropriation and the priority of *use*, shall have been made, it is manifest that the statute does not authorize the creation of such water districts.

It follows from what has just been said that there was not, at the time when appellants assumed to shut off the water then being diverted by the Reclamation Service, any lawfully authorized water district in existence in the territory supplied by the waters of the Boise river. There was, and is now, no valid decree touching the all-important matter of *use* of such waters among the appropriators, and therefore, under the plain proviso of Section 3274, that statute did not in any way apply to the territory watered by Boise river. Such being the case, there was, under Section 3275, no authority for the election of the watermaster. That section provides that "all persons owning or having the use of an *adjudicated* right in the waters of the stream of water supply comprising *such* district" shall meet and elect a watermaster. Since the conditions were such that a water district could not lawfully be established in the territory in question, it follows that there was no warrant



in law for the election of a watermaster for that territory. The statute uses the words "*such* district". It must be read in connection with Section 3274 immediately preceding it. The word "such" refers to the Districts authorized to be created by Section 3274, and since there was no lawfully created district there could be no lawful election of a watermaster. In further proof of what we have just submitted, Section 3275 provides that the watermaster shall be elected *for such* water district. This is for the water district mentioned in the preceding section, and no other. And further, Section 3275 provides that each person present shall be entitled to one vote provided that he own or have the use "of any *adjudicated right equal to ten (10) inches of water*" in the stream supplying such district and also that stockholders in corporations shall be entitled to as many votes as he shall have units of *ten inches* of water "*regularly adjudicated.*" Certainly it cannot be contended, in the face of the reversal of the State trial court's judgment by the Idaho Supreme Court, that any water user of the Boise river had *adjudicated* to him ten inches, or any other amount, of water. That phase of the trial court's decree was particularly and specifically the ground of reversal. There was at the time of appellants' interference with the Reclamation Service headgate, no decree, nor any other order of any Court, (App. Brief, p. 9) in force touching the question of the respective *amounts* of water to be apportioned among the several appropriators, nor any decree or order establishing the *amount per acre* to be used upon the lands under irrigation. It follows that the conditions precedent to the application of Sections 3274 and 3275 of the Idaho Revised Codes had not been fulfilled, and, therefore, these sections have no bearing upon the case at bar.

The same is true of Section 3277. A reading of that section, so much relied upon by appellants—in fact, it is their entire justification and defense—will show that the watermaster therein referred to means the watermaster to be elected under Section 3275, by the persons each owning an adjudicated water right equal to ten inches of water, in the water districts to be established pursuant to the conditions of Section 3274. What we have already said applies with equal force to Section 3277. The watermaster's authority all depended upon the existence of the conditions laid down in Section 3274. These conditions being absent, there was no water district, and, therefore, no watermaster. The fact that he, together with the state authorities, considered himself as having such title, does not alter the fact that, as a matter of law, both district and master were non-existent.

Appellants contend that the trial court in the case at bar committed prejudicial error because it appears from his opinion rendered on demurrer that he quoted to some extent from Sections 3274, 3275 and 3277 as they were enacted by the adoption of the Idaho Revised Codes by the Legislature of 1909, and did not take into consideration the fact that the same Legislature, a few weeks later, re-enacted the statutes in amended form. It is true that the trial court did confuse those statutes. Possibly he did not take into consideration the proclivity of the Idaho Legislature in the matter of amendments; probably he assumed that having adopted the Revised Codes at the opening of the session in January, 1909, the Legislature had been content to let those statutes stand for at least the brief sixty day period which the law prescribes as its session. In any event, by a comparative reading of the statutes as they appear in the Revised Codes and in their amended form

in the Session Laws of 1909, it will appear that no prejudicial error was committed in confusing the two. The statutes in amended form merely make more definite and specific what was undoubtedly their plain intentment as they were originally enacted. When the original statutes were enacted in 1903, they being then identically as they appear in the Revised Codes of 1909, (see Historical Foot Note to Secs. 3274, 3275 and 3277 Ida. Revised Codes), the obvious intent thereof was that the various localities, each irrigated by a public stream or source of supply, should be respectively made water districts as fast as the rights of the water users in said localities should be adjudicated by the courts of the State. It most certainly was not the intent of the Legislature, to vest arbitrary discretion in the matter of regulation of water rights, in a sub-executive officer such as a watermaster or water commissioner. The statutes, as amended by the Session Laws of 1909, as we have already fully pointed out, only make this intent more specific and definite. Also, it appears that the opinion on demurrer was rendered October 11, 1913, (Trans., p. 19) while the trial on the merits was had in the summer of 1915 (Trans., p. 79). It is not to be presumed that the court was under any misapprehension as to the condition of the Idaho statutes at the time of the trial. He was undoubtedly informed of their amended condition. Therefore, appellants were not in any way prejudiced by the court's original confusion of the statutes. In fact, what he said concerning the statutes in his opinion on demurrer is equally and more forcibly applicable to the amended statutes than to the originals.

Appellants contend that they were not only acting "in the rightful exercise of their official discretion," but that they



were carrying into effect the positive "mandate of the law."  
(Brief, p. 35.)

We have already shown by an analysis of the statutes in question, that an adjudication of the water rights on a given stream is an indispensable condition precedent, not only to the authority and duties of a watermaster, but to the very existence of a water district and of the watermaster himself. If appellants mean to say, by the statement in their brief just referred to, that the watermaster derives his authority from the statutes referred to *without* the existence of any judicial decree, a further conclusive answer can be made to their contention. If the statutes mean what they construe them to mean, they are plainly unconstitutional in that they vest in the watermaster the power to deprive a water user of property without due process of law. In the absence of a judicial decree, the only construction of these statutes by which they could become operative, is that the watermaster is authorized to deliver, or to refuse to deliver, water to a given water user, in his own discretion. He is advocate, judge and jury. Apparently appellants were driven to this conclusion by the force of their own argument, when they say, at the top of page 35 of their brief, and on the next to the last page thereof, that the watermaster was authorized to close the headgates of the Reclamation Service, *if in his judgment* he found it necessary.

The right to use water for a beneficial purpose is a property right.

Montpelier Mill Co. vs. Montpelier,

19 Ida. 212, 113 Pac. 741.

A water right is real property appurtenant to the land irrigated thereby.

Taylor v. Hulett, 15 Ida. 265, 19 L. R. A. (N. S.) 535, 97 Pac. 37.

Neilson v. Parker, 19 Ida. 727, 115 Pac. 488.

Gard v. Thompson, 21 Ida. 485, 123 Pac. 497.

In view of the foregoing citations, stating the law under which water rights are characterized and exercised in Idaho, we respectfully inquire, since when, and pursuant to what principle of English law, has it been held that a party's real property rights may be determined, and their exercise be controlled, by a minor executive officer?

Concerning the power of the State Legislature to provide for the arbitrary regulation of property rights without proper notice to the owners thereof and without proper judicial proceedings, the Supreme Court of Idaho has said:

"There is no doubt that the Legislature has power to regulate, to a certain extent, the use of private property under what is denominated the police power of the State. But under the act in question it has attempted to go beyond its legitimate police power and sought to *determine* private rights to private property, without due process of law, which it is prohibited from doing by the fourteenth amendment of the Federal constitution and that provision of our State constitution which provides that no person shall be deprived of life, liberty or property except by due process of law. If we were to concede that said provisions were intended as a police regulation, we could not permit the *settlement of adverse interests or titles to private property* without reasonable notice to the parties interested." (Italics ours.)

Bear Lake County v. Budge,  
9 Ida. 703.  
75 Pac. 614.

A reading of the last cited case will disclose that the statutes there held to be unconstitutional were far more consonant with the provisions for due process of law than the statutes here under discussion, if they are to be construed as requested by appellants.

An action to fix the extent and priority of water rights is in the nature of an action to quiet title. *Taylor vs. Hullett, supra.*

Under appellants' contention, the power to determine the priority and extent of water rights on the Boise river, which the Idaho Supreme Court has said are real property and the proper subject of an action to quiet title, would be vested in the executive branch of the State government, and the performance of such function delegated to a minor appointive officer.

The proper procedure to secure relief against interference with a water right is to initiate proceedings looking to the injunction of the courts against such interference.

*Moe vs. Harger*, 10 Ida. 302, 77 Pac. 645.

If the appropriators of the waters of Boise river, whose rights were prior to those of the Reclamation Service, were in need of protection from the interference of the Reclamation Service officials, they should have asked a Court of competent jurisdiction to enjoin such interference. Such a proceeding would be "orderly" and outside the "rule of force," even as contended for in appellants' brief. (Page 25.)

And finally, a watermaster's proper guide in the distribution of the waters of a stream is a *decree* fixing the respective rights of the appropriators therein. It is not his duty to look beyond the decree.

*Stetham vs. Skinner*, 11 Ida. 374, 82 Pac. 451.



It will be observed that this last case was decided under Section 3275 as enacted in 1903, which section, as we have already pointed out, was re-enacted without change in the Revised Codes of 1909, and which section is not changed as to the purport or effect thereof by the amendment of 1909, but is only made more definite and specific. We take it that under that section, and under section 3277, a watermaster's "duties" and his "powers" are synonymous. If a "power" is granted him, it is his "duty" to exercise such power. The statute performs the double function of defining his powers and of imposing upon him the duty to exercise such powers. Therefore, if, as the State Supreme Court has said in the last cited opinion, it is not his *duty* to look beyond a decree of the water rights under his control, neither is it in his *power* to look beyond such decree. Which is merely to show in another form what we have already said, to-wit: that in the absence of a decree of the water rights in a stream, there is no function for a watermaster to execute, and no provision in law for his existence.

And finally, we again call attention to the fact that *Farmers Co-Op. Ditch Co. vs. Riverside Irrigation District*, relied upon by appellants, was reversed and sent back to the Supreme Court for a new trial. As appears from the entire transcript of the evidence in this case, it has been in court ever since, pending such new trial. If the parties to that suit, who were *all* of the appropriators of Boise river whose rights are prior to those of the United States, had wished to form a district and to place the distribution of water in that district in the hands of a watermaster, the courts have been open to them all these years to hold such new trial and to procure such decree, under which a district could properly be formed in which a watermaster could properly act within the provisions of the

statutes in question. Not having done so, they cannot complain because the watermaster is unauthorized to act; in fact, *they* are not complaining. Nor can these appellants claim any immunity from the law which holds them responsible as trespassers and tort-feasors upon the property of the United States.

### III.

Under this head we group our argument in reply to subdivision III. and IV. of appellants' brief, pp. 36 and 40.

In sub-division III. of their brief, page 36, appellants contend that the trial court in the case at bar was without jurisdiction to hear the case, on account of the fact that there was pending the state courts the case, already fully discussed, which was intended to procure a decree fixing the water rights of all appropriators of Boise river whose rights were prior to those of the United States. Also, that the trial court, in order to decide this case, was under the necessity of making findings as to the water rights of all of these prior appropriators.

As stated on page 6 of appellants' brief, the United States was not a party to the action in State court referred to. By the most elementary principles of law, it was not, therefore, bound in any way by that action, so far as a determination of the extent of its own rights was concerned. And since the case at bar is based exclusively upon a violation of the rights of the United States, it is idle to talk of the case in State court as being a bar to the prosecution of this action. Further, the United States District Court was the proper forum in which to hear "all suits of a civil nature, at common law or in equity, brought by the United States."

United States Judicial Code, Sec. 24.

•The United States would not have been a proper party to the action in State Court, had it been attempted to make it a party. The United States is the sovereign power. The sovereign cannot be sued without specific consent to that effect. There is nowhere to be found the consent of the United States to its being sued in a State Court; and when the United States appears as a party plaintiff, the proper tribunal is the United States Court, as shown by the Section of the Judicial Code above cited. See also *United States v. Sayward*, 160 U. S. 493.

So far as a finding of the trial Court in this case as to prior rights in the river is concerned, such a finding, if necessary at all, would be merely incidental and not in any sense an adjudication of the rights of prior appropriators which would be binding upon them. No attempt was made to obtain such a decree, and no such a decree was asked for in the bill. The bill and the supplement thereto merely prayed that defendants be enjoined from interference with the government's water rights, and that damages be given for such interference, if committed (Trans., pp. 15 and 68). There is, therefore, no virtue in appellants' contention that the trial Court was without jurisdiction. Appellants cite on page 39 of their brief the authorities upon which they rely in this regard, to the effect that where two suits involve the *same* subject matter, of which subject matter the State and Federal Courts have *concurrent* jurisdiction, the Court which first acquires jurisdiction will retain it to the end of the litigation. As pointed out, the suit in State Court did not in any way involve the rights of the United States, while the case at bar in Federal Court involved the rights of the United States and nothing else. Therefore, the subject matter is not the same, nor is the jurisdiction concurrent.



In subdivision IV. of their brief, appellants contend that the bill of the United States does not allege that it was rightfully entitled to the water which it was diverting on July 11, 1913, and that, therefore, the bill did not state a cause of action. They cite authority for the proposition that in an *action for damages* for injuries to water rights the plaintiff should allege ownership or right of possession therein. A sufficient answer to this proposition is, that this is an equity suit in which the principal relief sought was an injunction preventing appellants from interfering with the property rights of the United States, and asking that damages be awarded as incidental to the principal cause of action. This is not, therefore, an action for damages. It is a suit for equitable relief. Having taken jurisdiction of the suit for one purpose, the trial Court, under the familiar rule of equity procedure, retained jurisdiction for all purposes, and, therefore, heard the case in the matter of the damages prayed. "Equity does not make two bites of a cherry."

Appellants also contend that the United States has failed to establish its right to the use of the water of which it claims to have been deprived. Without discussing this argument in full, it will be observed that the argument centers about a tabulation appearing on page 51 of appellants' brief. This tabulation purports to show that from July 11th to July 18th there was not sufficient water in Boise river to supply the appropriators whose rights were prior to those of the United States, and that, therefore, the United States was not entitled to the use of any water whatever during that period. The difficulty about this tabulation is, that it is supported by neither the facts nor the law.

In column 5 of said tabulation appear figures which pur-

port to represent the number of second feet to which the appropriators, prior in time to the United States, were entitled during said period. The data for these figures is taken from plaintiff's Exhibit G. Exhibit G is the Stewart decree, which is the decree which was reversed in *Farmers Co-Op. Ditch Co. vs. Riverside Irrigation Dist.*, 16 Ida. 525, heretofore discussed (Trans., p. 93). Therefore, appellants have based their statement as to the amount of water to which prior appropriators were entitled before the United States should become entitled to any, on a decree which was specifically reversed and set aside years before the time appellee's cause of action arose. Further, the Supreme Court of Idaho, as before set forth, has said concerning that decree, on which appellants now rely for their data in said tabulation, that they are satisfied that the amounts of water thereby decreed to the prior appropriators in that suit are excessive. It plainly appears, in view of this, that appellants' tabulation contains a gross mis-statement in column 5 thereof.

It is the settled law of Idaho that the waters of the State available for irrigation purposes shall be subjected, *as a matter of law*, to the *highest and greatest duty possible*.

VanCamp vs. Emery, 13 Ida. 202, 89 Pac. 752.

Niday vs. Barker, 16 Ida. 73, 101 Pac. 254.

Farmers Co-Op. Ditch Co. vs. Riverside Irrigation Dist., *supra*

Washington State Sugar Co. vs. Goodrich, 27 Ida. —, 147 Pac. 1073.

Therefore, since the waters of Boise river were required by law to perform the greatest possible duty, that is to say, that a given amount of land shall be irrigated by the least possible

water, and since, as before pointed out, the Supreme Court has said that the identical water users to which plaintiff's tabulation refers, in column 5 thereof, are not entitled to the amount of water granted them in the Stewart decree, it follows necessarily that appellants' statement of the amount to which those water users are entitled, being based upon the original Stewart decree, is incorrect, as a matter of both fact and law. We insert herein a table, on the following page, which shows the total flow of water in the river at Highland Station, which station is above the points of diversion of the United States and all other water users on the river, on each day from July 11th to July 18th, inclusive. (See table, columns 1 and 2.) Also the amount which appellants allowed to flow in the government canal on each of said dates. (Column 3.) The total amount available to supply all of the water users whose rights were prior to those of the United States. (Column 4). The total amount to which all of said prior appropriators were entitled. (Column 5). The prior rights which were supplied during said period by the government canal. (Column 6). A net total of prior rights to be supplied *otherwise* than by the government canal. (Column 7). The *surplus* of water which would have been flowing in Boise river on each of said dates, after all prior rights *and* the government rights had been supplied. (Column 8).

Columns 1, 2 and 3 in the foregoing table coincide with the same columns in appellants' tabulation. Column 4 coincides with the same column in appellants' tabulation, except that to the amount as given for each day of said period in appellants' tabulation as being available for supplying prior rights, we have added the amount of the additional flow coming into Boise river below the point of intake of the government canal,



1 Date	2 Measured flow at Highland Station •	3 Amount in Government Canal	4 Amount Available for Prior Rights	5 Total Amount of Prior Rights	6 Prior Rights Supplied by Govt. Canal	7 Net Total of Prior Rights	8 Surplus After Supplying All Rights
July 11.....	2420 sec. ft.	261 sec. ft.	2159+551 =2710 sec. ft.	1653 sec. ft.	219 sec. ft.	1434 sec. ft.	1276 sec. ft.
July 12.....	2200 sec. ft.	312 sec. ft.	1888+551 =2439 sec. ft.	1653 sec. ft.	249 sec. ft.	1404 sec. ft.	1035 sec. ft.
July 13.....	2100 sec. ft.	344 sec. ft.	1756+551 =2307 sec. ft.	1653 sec. ft.	323 sec. ft.	1330 sec. ft.	977 sec. ft.
July 14....	1990 sec. ft.	435 sec. ft.	1555+551 =2106 sec. ft.	1653 sec. ft.	452 sec. ft.	1201 sec. ft.	905 sec. ft.
July 15.....	1890 sec. ft.	464 sec. ft.	1426+551 =1977 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	797 sec. ft.
July 16.....	1800 sec. ft.	478 sec. ft.	1322+551 =1873 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	693 sec. ft.
July 17.....	1710 sec. ft.	487 sec. ft.	1233+551 =1784 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	604 sec. ft.
July 18.....	1710 sec. ft.	436 sec. ft.	1274+551 =1825 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	645 sec. ft.

due to return flow, seepage and tributary flow, which additional amount is not shown in appellants' tabulation. 'his amount totals 551 second feet as an average for each day covered by the two tabulations. Appellants practically concede the correctness of this estimate of the return flow (App. brief p. 53). They state, however, that this estimate "would be exceedingly liberal" to the United States. This is an error. Not only does the testimony in the transcript, page 132, show this, but also the testimony of A. V. Tallman, not an employe in the government service, but, on the contrary, a special deputy from the State Engineer's office, shows that the return flow into Boise river below the government canal and available to all others, during the month of July runs all the way from 600 to 827 second feet. (Trans., pp. 144 and 115). Such being the case, it is very clear that the total amount available to appropriators whose rights are prior to those of the United States should be arrived at by, first, subtracting from the *total* flow of the river, above all of the points of diversion, (Column 2) the amount diverted by the government canal, which is the first canal to take water from the river, (Column 3); and, second, to the remainder thus arrived at must be added the additional amount of water which flows into Boise river below the intake of the government canal, which additional amount is conservatively estimated at 551 second feet. We have, therefore, to quote one instance, on July 11th, 2420 second feet as the total flow of Boise river above all points of intake, minus 261 second feet, the amount allowed by appellants to flow in the government canal on said date, equalling 2159 second feet, the balance of the total flow remaining after the government canal had taken out the stated amount; in addition to this balance there flowed into the river at different points below the

government's point of intake, so as to be available to all other appropriators taking from the river below the government canal, which includes *all* other than the government, 551 second feet; 2159, the said balance, plus 551, the said additional or auxillary flow, equals 2710 second feet, the *total* amount available to supply the appropriators along the river exclusive of the amount allowed to flow in the government canal on said date. We submit that these figures are indisputably correct.

The next inquiry is naturally as to the total amount *reasonably necessary* to supply the rights prior to those of the government. It will be observed that the period of time covered by these tabulations lies in the latter part of the irrigation season. Every year since the reversal of the Stewart decree by the Supreme Court, the appropriators along Boise river had used, during the latter half of the irrigation season, six-tenths of an inch per acre of land. (App. brief, p. 9). Inasmuch as there is no dispute that this amount has been found to be ample for the needs of the appropriators, and in view of the settled law of Idaho, hereinbefore set forth, to the effect that land shall be irrigated with the least possible amount of water, it follows as an inevitable conclusion, first, that these prior appropriators were entitled *only* to the least amount of water necessary for their use, and second, that, as proven by past experience extending over a period of years, six-tenths of an inch per acre was ample for their needs. The Stewart decree fixed one inch per acre. The amount really necessary was, as just pointed out, *six-tenths* of one inch per acre. Therefore, the amount really necessary for all prior appropriators was six tenths of the total amount decreed by the Stewart decree. And since this total amount necessary for prior rights shown in ap-



pellants' tabulation is the total amount allowed by the Stewart decree (App. brief page 52), it follows that appellants' figures in this respect are erroneous, and that to arrive at the correct figures there should be taken six-tenths of 2755 second feet, the amount set forth by appellants, or 1653 second feet, as being the total amount necessary to supply all rights prior to those of the government. Accordingly, our tabulation shows this amount in column 5 thereof.

On each day of the period covered by these tabulations, one of the prior rights was carried through the government canal, to-wit: that of the New York Canal Company. This was done pursuant to the government's contract to that effect with the Canal Company (Trans., pp. 88-90). Therefore, in each day's calculations the amount so carried for the Canal Company should be eliminated from the amount necessary to supply the rights prior to those of the government. Accordingly, we have subtracted the respective amount so carried by the government canal, as shown by column 6 of our tabulation for each day, from the total amount necessary to supply prior rights, which total was 1653 second feet. For instance, on July 11th the government canal carried 219 second feet for the New York Canal Company. This amount subtracted from 1653 second feet leaves, for July 11th, 1434 second feet as the net total amount of water necessary to supply prior rights other than those of the New York Canal Company (Column 7). On the same date, the total amount over and above the amount allowed to flow in the government canal by appellants, *available* for supplying all rights prior to those of the government after deducting the amount in the government canal, was 2710 second feet (Column 4). But after deducting from the total amount necessary to supply all prior rights, 219 second feet,

we found, as shown above, that only 1434 second feet was necessary to supply all remaining prior rights (Column 7). Available for this purpose, we have on the same date 2710 second feet (column 4). There was, therefore, on that date a surplus of 1276 second feet over and above the amount which appellants permitted to flow in the government canal and the total amount necessary to supply all rights prior to those of the government. In the same manner, it is shown by our tabulation that there was a surplus on each day of the entire period. The smallest surplus was on July 17, 604 second feet.

Turning now to the evidence in this case, it is shown that the amount to which the Reclamation Service claimed to be entitled for each day of this period was 980.4 second feet. (Trans., pp. 87 and 97). It will be further noted that the amount to which the government was *prima facie* entitled by the State Engineer's license was 1647 second feet (Trans., See plaintiff's Exhibit E and Trans., p. 97). The government was not claiming a right to divert the total amount for which the State Engineer had issued his permit and license, nor anything like that amount. 980.4 is six-tenths of 1647. Therefore, the government was following the precedent as followed by all other water users along the river for years previous, and was taking only six-tenths of the amount to which it was licensed. This is the same proportion as that to which, as shown earlier in this branch of the argument, others were entitled. Also it will be remembered that out of this six-tenths of its licensed amount the government was delivering to the New York Canal Company all the way from 219 to 277 second feet (Trans., p. 98). It was not, therefore, getting even as much as six-tenths of the amount to which it was licensed. It

was, in fact, getting considerably less than half of that amount for its own use.

Turning again to our tabulation previously discussed, it will be observed that during every day of the period of time covered by that tabulation there was enough water to supply all prior rights with the amount to which they were entitled, and to leave on each day a surplus more than sufficient to furnish the government the difference between 980.4 second feet, which it claimed, and the amount which appellants allowed to run in its canal. For instance, the smallest surplus was on July 17th. On that day the government was allowed by appellants 487 second feet of water. It claimed the use of 980.4 second feet. To make up this amount, it would have been necessary to add to the 487 second feet, actually allowed to run in the canal, an additional amount of 493.4 second feet. Inasmuch as there was enough water in the river to supply all prior appropriators and to leave a surplus of 604 second feet, it follows that out of this surplus the additional 493.4 second feet claimed by the government could have been furnished and still leave in the river a surplus above *all* rights of 110 second feet.

It will be further observed that the amount claimed by the government, 980.4 second feet, was arrived at by an agreement with the prior appropriators, or their attorneys, entered into between them and the officers of the Reclamation Service (Trans., pp. 97, 99, 102). Up to the time that appellants and other State officials arrogated to themselves the right to trespass upon and take charge of the property of the United States, and to place gun men on guard over the same, (Trans., p. 107), the Reclamation Service and the other appropriators along the river were working together in an entirely peace-



ful and orderly manner. The claims of the government were more than fair, inasmuch as the Reclamation Service was taking proportionately much less water than it was willing to concede to the other appropriators. There was, at all times, sufficient water in the river to supply all needs. This is abundantly shown by the foregoing portion of our brief, and while we do not for a moment concede that it was necessary, as a matter of law, to prove the extent of the United States' rights, or anything further than simply possession thereof, in view of the fact that appellants were tort-feasors and intruders without any justification whatever, (see within), yet we submit that it plainly appears from the foregoing that the United States was abundantly entitled to all the water that it was claiming during the period in question.

We wish further to point out, in connection with subdivisions 3 and 4 of appellants' brief, that inasmuch as there was no subsisting decree fixing the rights of use in the waters of Boise river, appellants had no justification under the statutes relied on, as heretofore shown, and that, therefore, they were mere trespassers and tort-feasors. The fact that they claim to have acted under orders is no justification.

28 A. and E. Enc. 569. (Second edition).

Mitchell vs. Harmony, 113, How. (U. S.) 115.

Neither was any advice of the Attorney General's office or of other counsel any defense.

28 A. and E. Enc. 561.

As said in *Raleigh vs. Goschen*, 1 Ch. 73,

"If any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offense, he cannot prevent himself being sued, merely because he acted

in obedience to the order of the Executive Government or of any officer of State.”

Nor is a plaintiff in an action against a mere trespasser under any need to prove his title to the property trespassed upon. Possession being admitted, as in this case, this is sufficient foundation for the action. If the defendant claims title in himself as a defense, the burden of proof in that respect is on him.

28 A. and E. Enc. 601.

Bare possession in a plaintiff is sufficient in an action for trespass to realty against a mere intruder. He cannot, possession being shown, question plaintiff's title.

28 A. and E. Enc., 573 *et seq.*,

And authorities there cited.

As said in *Graham vs. Peat*, 1 East. 244,

“Any possession is a legal possession as against a wrong-doer.”

And in 2 *Wheat. Schw.* 1018,

“Even a tortious possession will support trespass against a wrong-doer.”

So far as title is concerned the fact was, as shown before, that the United States held a permit and a license from the State Engineer entitling it to the use of 1647 second feet of water. Not only was this water right real property, but the license from the State Engineer was by statute made *prima facie* evidence of the right to use, not 980.4 second feet, but the total amount.

Ida. Revised Codes, Sec. 3262.

This license, while not *conclusive*, was certainly abundant authority to take any amount, up to 1647 second feet, *as against a mere trespasser*.

We submit that in view of the foregoing authorities, which state beyond doubt the established law in the matter of trespass by a mere wrong-doer, mere possession by the government of the water in question was amply sufficient to sustain a judgment for damages against appellants.

#### IV.

In this subdivision of our argument we discuss the matters dwelt upon in subdivisions 5, 6 and 7 of appellants' brief.

In the opening of subdivision 5 of their brief, appellants make the claim that by reason of the fact that they prevented the bulk of the water claimed by the government from passing through its canal they thereby increased the amount of water flowing down the river so as to be available for use at the government power plant. In support of this contention, they refer to page 87 of the transcript. The testimony at that point merely shows that on July 11th appellants prevented from passing down the government canal 719.2 second feet of water to which the government was entitled.

The facts of this matter are, that the point of diversion from the river into the government canal, that is to say, the headgates of the canal, are immediately *above the* government power plant. About a mile *down the canal* is what is termed a wasteway, running from the canal back into the river. Between the point of diversion, or headgates, and the point where water running through this wasteway again reaches the river, is the government power plant. Therefore, water taken into the



canal at the headgates, carried down the canal to the wasteway, and there diverted from the canal and carried through the wasteway back into the river, is carried *around* the government power plant from a point immediately above the power plant and put back into the river at a point *below* the power plant. It is very evident, therefore, that water thus carried through the canal and the wasteway would never reach the power plant. When it got back into the river through the wasteway it would be below the power plant and would very naturally flow on down the stream. The witness Bliss, referred to by appellants in this connection, at page 94 of the transcript, testifies that the interference by appellants with the government's water took place at the point where the wasteway diverts water from the canal and carries it back into the river. He also states:

"There was water diverted through the main canal and wasted at the Barber wasteway that was of no use to us in our irrigation, that could have gone through the power plant and created more power, provided it was necessary to waste it at all. We have a wasteway in the main canal approximately a mile below the headgates and they regulated the canal at that point rather than at the headgates. If they had regulated it at the headgates, that water would have gone through the power plant. As they did regulate it, it went through the wasteway and the power plant did not get the use out of it. We develop power at the diversion dam, and the act of taking water through the main canal and wasting it out through the wasteway rather than through the power plant deprived us of that much power. This decreased the output of the power plant.

"THE COURT: In other words, more water was taken in at the point of diversion than was permitted to go on down through the canal?

"A. Yes.

"THE COURT: Did you object to that?

"A. It decreased our power that much.

"THE COURT: I say, did you object to that?

"A. At that time? Yes, sir. We called his attention to it at that time."

In this connection, we invite the further attention of this court to plaintiff's Exhibit C, showing the relative location of the canal headgates and the diversion dam there erected to divert water into the canal through such headgates, the power plant, and the United States irrigation system generally.

It appears conclusively from the foregoing that when appellants assumed to interfere with the Reclamation Service water right, they did not regulate the flow into the government canal at the headgates. They let the headgates stand at the same level as formerly, whereby there was diverted into the canal the same amount of water as always. But they did regulate the canal at the point where the wasteway runs out of the canal to the river. At that point they raised the gates to such an extent that the greater portion of the water flowing in the canal was checked and diverted through the wasteway back into the river, allowing to go down the canal to the lands irrigated thereby only the amounts of water shown for each day in column 3 of our tabulation hereinbefore inserted. It follows that the governments contention is correct. If appellants had raised the *headgates* of the canal at the point of intake, there would have flowed into the canal only the amounts as shown in our tabulation. The amount of water prevented from flowing into the canal by raising the headgates would have then flowed on down the river proper and would necessarily have passed through the government power plant immediately below such headgates. On the other hand,

by allowing the full head of water to go down the canal, and then diverting it through the wasteway back into the river, it was taken from the river above the power plant and put back into the river below the power plant, thereby preventing it from flowing through the power plant.

It will be observed that these appellants assumed complete control of the waters of the river, and that, therefore, they should be held liable for all natural and probable consequences of their acts committed in that respect. Thus, they were diverting water from the river above the power plant apparently for the sole purpose of taking it down the government canal and wasting it back into the river at a point below the power plant, and in this manner were depriving the government of the use of that water for power purposes. There is no conceivable reason why this should have been done. It plainly appears, therefore, that not only were the appellants interfering <sup>in July</sup> with the water to which the government was entitled for irrigation purposes, but also <sup>that in August & September</sup> they were deliberately reducing the flow of the river above the power plant in such a manner as to decrease the flow available for power purposes. (See, p. 108, Pl. Ex. "H" & "I"). It was quite proper that the Court should assess damages for the resulting loss of power, as well as for the <sup>earlier</sup> loss of water for irrigation purposes. The appellants had tortiously assumed complete control of that section of the river, and they should, as trespassers and tort-feasors, be held liable for all damages proximately resulting from their acts.

As to appellants' further contention in subdivision 7 of their brief, that no measure of damages has been set up by which the Court could properly estimate the same, we refer this Court to pages 108 and 120 of the transcript, also to plaintiff's Exhibit H. It appears from these citations that the



amount of power which would have been developed had the additional amount of water in question flowed through the government power plant, was carefully estimated and put into evidence. It further appears that there was in existence between the United States and a private company a contract for the sale of power at a specified rate. By the testimony of the witness Markus, (Trans., p. 120), it is shown not only that this private company would have taken all of the power which could have been developed from this additional water, but also that they construed the contract referred to as *requiring* them to take all of the government's surplus power. In this connection, see also plaintiff's Exhibits I and J, showing the amount of power lost to the government, and its contract with the private power company above referred to.

As to appellants' contention that no standard was set up whereby the Court could estimate the damages incurred by the government on account of the loss of additional water to which it was entitled for irrigation purposes, see the Transcript at page 90. It is there shown that at the time of appellants' acts complained of, 980.4 second feet of water was not only used but *required* to irrigate the lands taking water from the government canal. This amount had been diverted into the canal up to the very moment when appellants interfered with the gates at the government wasteway. After loss by seepage and evaporation, 65 per cent. of this amount had been delivered to the farmers (Trans. p. 103). For each and every *acre* foot of this so delivered, the government had been receiving 40 cents, (Trans., p. 90). It, therefore, appears that the estimate of the government's damages was a simple proposition of mathematics. The number of second feet of water of which the government was each day deprived by the

unlawful acts of appellants, multiplied by 1.98, gives the same amount in *acre* feet (Trans., p. 90); 65 per cent. of this number of acre feet multiplied by .40 gives, in dollars and cents, the amount which was lost to the government by appellants' acts. This sum was lost to the government because it could not deliver the water to the farmers. A calculation of this amount will show not only that the Court was abundantly justified in assessing damages at \$1000, but that this estimate was more than liberal to appellants. In the period of time to which our argument relates, namely, from July 11th to July 18th, inclusive, there were eight days. The government was entitled to the use of 980.4 second feet of water for each day of that period. The total amount of water to which it was entitled for the whole period, expressed in second feet, is therefore arrived at by multiplying 980 second feet by eight. This gives a total for the whole period of 7840 second feet. The amount which the government was allowed by appellants for each day of the period is shown in our tabulation in column 3 thereof. By adding together the different amounts shown in said column 3, we obtain the total amount of water allowed the government by appellants for the whole period. This amount is 3217 second feet. To arrive at the total amount of which the government was deprived for this period, 3217, the amount allowed the government, should be subtracted from 7840, the amount to which it was entitled. This gives 4623 second feet. To reduce this amount to acre feet, it should be multiplied by 1.98. This gives 9153 acre feet. At 40c per acre foot, the value of this amount is \$3661.20. But as shown above, the entire amount of water taken into the canal at the headgates could not, under existing conditions, be delivered to the farmers along the canal. Only 65 per cent

of the entire amount was so delivered. Therefore, the government's damages would not be the total sum of \$3661.20, just obtained, but would be 65 per cent of that amount. Sixty-five per cent of \$3661.20 gives \$2,379.78. This is the true measure of the government's damages from July 11th to July 18th, for its loss of water for irrigation purposes *only*. To this amount should be added its further damages for loss of power, as discussed above. We repeat, that the Court's estimate of damages was more than liberal to appellants.

It will be noted in this connection that we have based our argument entirely upon the period of time between July 11th and July 18th, inclusive. As shown by the testimony in this case, appellants continued their unlawful interference with the government works not only throughout this period, but also for the entire remainder of the irrigation season. This fact makes it doubly apparent that if the government were insisting upon its "pound of flesh," it could very well have insisted upon damages for the loss of water for that entire period, which would have totalled a very large amount of money.

In conclusion, as to the question of damages to be allowed in this case, we call the Court's attention to certain passages from the foremost authority on this subject:

"There is no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of a cause. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when, from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, no objection is perceived to placing before the jury all the facts and circumstances of the case having



any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and accurate estimate which the nature of the case will permit."

Sutherland on Damages, Sec. 70, p. 220.

"A plaintiff in possession under color of title to the fee can recover against a stranger as owner. If the defendant be a mere intruder *he cannot set up title in a third person*, either to affect the cause of action or in mitigation."

Sutherland, Sec. 1012, p. 2962.

### CONCLUSION.

In conclusion, we submit that the law of the State of Idaho, even granting that government property would be entirely subjected to such law, does not in any way justify or mitigate the trespass committed by appellants. That the learned trial Judge who pronounced the judgment from which appellants now appeal committed no error prejudicial to appellants, and indulged in no "guesswork" or "haphazard" methods in determining appellee's damages. Appellants' trespass was indefensible and was aggravated by the high-handed actions indulged in, and by the employment of gun men who insolently took possession not only of the government canal, waste gates, and water, but ensconced themselves in the government's building near at hand, where they proceeded to sleep, cook their meals, and generally to make themselves at home while they divided their time so as to maintain a continuous armed watch over the government's property. Such action should not be tolerated by the courts for one moment. It is true that appellants acted under directions from the State authorities, and while this is no defense, the Court has very evidently

taken it into consideration in assessing against them the very smallest damages possible.

In this connection, attention is called to the testimony of the appellant Marsters. His is the only testimony offered by defendants, appellants here, on the trial of this cause. His testimony does not any wise explain, avoid, or mitigate the trespass which had already been proven by the government. In fact, appellants' case would be stronger had he not testified. He says, at page 139 of the transcript, that he has been a farmer and an auctioneer all his life. That he does not "pretend to know how to measure water flowing in a canal. I couldn't tell what number of second feet were flowing in a canal of a certain capacity." He further says that in all of his testimony, in speaking of the rights of prior appropriators, he means their rights under the "Stewart decree." This is the man whom the officials of the State of Idaho put in charge of the government's property. A man who did not even know how to measure water flowing in a canal. Whose only guide and authority is a decree which was reversed by the Supreme Court of the State some four or five years before he assumed to act in the capacity of water master—an office which, under the proven facts in this case, had no lawful existence. In the face of these facts, appellants contend that the government should supinely submit to whatever treatment he chose to accord its property and its servants; submit to the caprice of a man ignorant of the very rudiments of the matter in which he assumed to act; submit to the domination of armed guards. We think that in the face of these facts the position of the government in this matter needs neither apology nor justification.

We submit that the judgment of the trial Court should be affirmed.

J. L. McCLEAR,  
*United States Attorney, District of Idaho.*

J. R. SMEAD,  
*Assistant U. S. Attorney, District of Idaho.*

B. E. STOUTEMYER,  
*Counsel, U. S. Reclamation Service.*  
*Attorneys for Appellee.*

Residence, Boise, Idaho.



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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NATIONAL PACIFIC OIL COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record.

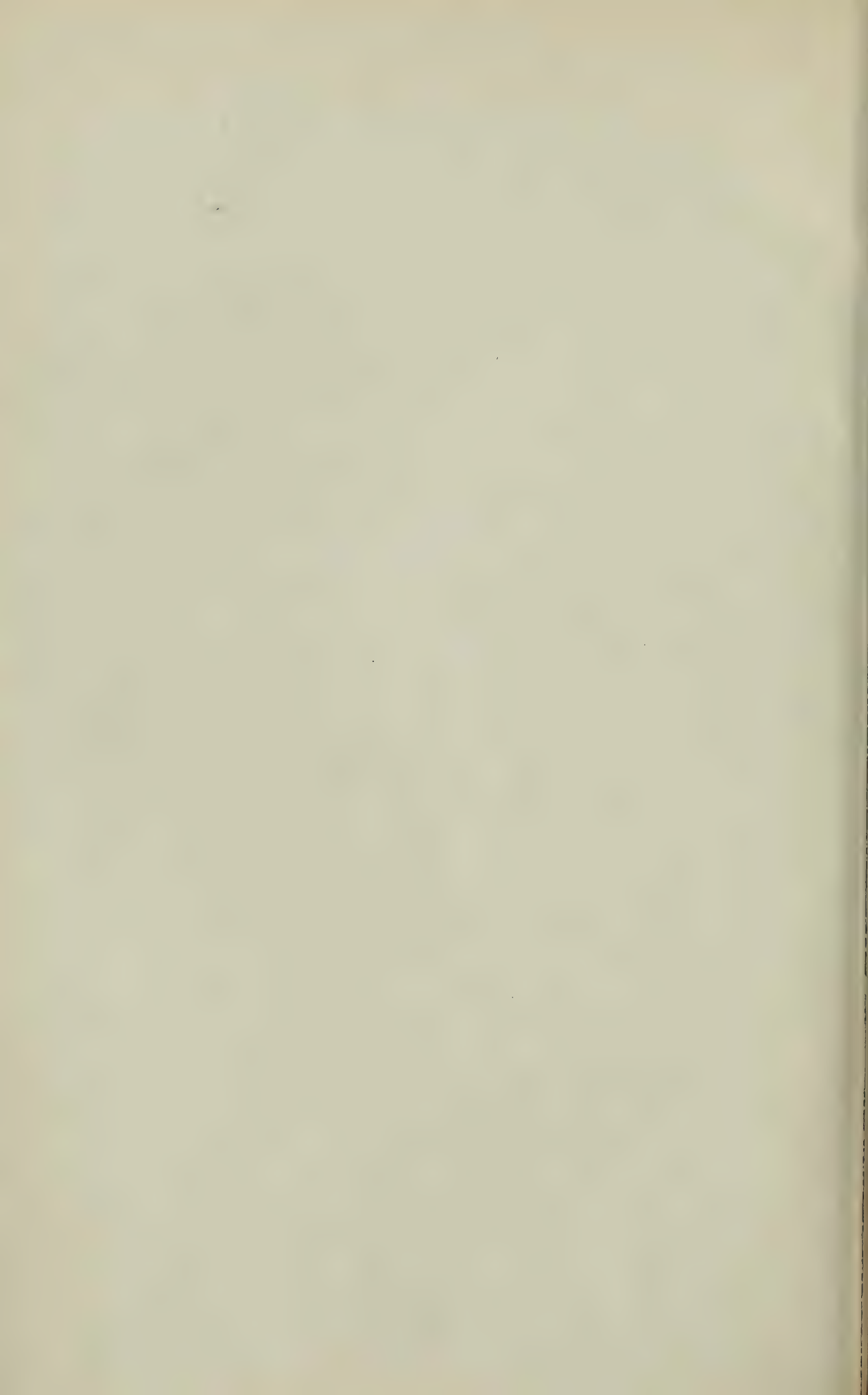
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Upon Appeal from the United States District Court for the  
Southern District of California, Northern Division.

Filed

NOV 1 - 1915

F. D. Monckton,  
Clerk.



No. 2657

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within

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## **Names and Addresses of Attorneys.**

For Appellant:

A. L. WEIL, Esq., 1206 Alaska Commercial Building, San Francisco, California.

For Appellees:

THOMAS W. GREGORY, Esq., Attorney-General of the United States, Washington, D. C.;

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California; and

E. J. JUSTICE, Esq., Special Assistant to the Attorney-General, Postoffice Building, San Francisco, California. [3\*]

---

### **[Citation on Appeal (Original).]**

UNITED STATES OF AMERICA,—ss.

The President of the United States, To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Southern District of California, Northern Division, Ninth Circuit, wherein the National Pacific Oil Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice

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\*Page-number appearing at foot of page of certified Transcript of Record.

should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING,  
United States District Judge for the Northern Dis-  
trict of California this 21st day of May, A. D. 1915.

M. T. DOOLING,  
United States District Judge. [4]

Service accepted this 26 day of May 1915.

E. J. JUSTICE,  
P.

United States of America,—ss.

On this 26th day of May, in the year of our Lord  
one thousand nine hundred and fifteen, personally  
appeared before me, Flora Hall, Notary Public in  
and for the City and County of San Francisco, the  
subscriber, Charles M. Weile, and makes oath that he  
delivered a true copy of the within citation to United  
States of America, delivered to E. J. Justice, Solici-  
tor for the within named plaintiff.

CHARLES M. WEILE.

Subscribed and sworn to before me at San Fran-  
cisco, Cal., this 26th day of May, A. D. 1915.

[Seal].      FLORA HALL,

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: No. A-3—In Equity. United States  
District Court for the Southern District of Califor-  
nia, Northern Division, Ninth Circuit. National  
Pacific Oil Company, Appellant, vs. The United  
States of America. Citation on appeal. Filed Jun.  
1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N.  
Williams, Deputy clerk.

*In the District Court of the United States, in and for  
the Southern District of California, Northern  
Division.*

No. A-3—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED, Midland Oilfields Company Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. B. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W.



*Midland Oilfields Company, Ltd., vs.*

Mary Waite, M. P. Waite, D. C. Wallace, Jr.,  
A. L. Weil and Florence G. Weil,  
Defendants. [5]

*In the District Court of the United States, Southern  
District of California, Northern Division Ninth  
Circuit.*

No.A-3—IN EQUITY.

THE UNITED STATES of AMERICA,  
Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIM-  
TED, et al.,

Defendants.

**Bill of Complaint.**

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,  
United States Attorney.

B. D. TOWNSEND,

Special Assistant to the Attorney General.

Filed Feb. 27, 1913. Wm. M. Van Dyke, Clerk.  
By Chas. N. Williams, Deputy Clerk. [6]

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,  
Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIM-

ITED; Midland Oilfields Company, Limited; El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Halderman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil,

Defendants. [7]

To the Judges of the District Court of the United States for the Southern District of California,

Sitting Within and for the Northern Division  
of Said District:

The United States of America, by George W. Wickersham, its Attorney General, presents this, its Bill in Equity, against American Oilfields Company, Limited, Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil (citizens and residents, respectively, as stated in the next succeeding paragraph of this bill), and in that behalf the plaintiff complains and alleges:

I.

Each of the defendants American Oilfields Com-



pany, Limited, National Pacific Oil Company, Miocene Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company and [8] Thirty Thirty-Two Land Company, now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the State of California, and is a resident and citizen of said state. Each of the defendants El Dora Oil Company, Consolidated Midway Oil Company, Pan American Oil Company and Maricopa Consolidated Oil Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the former territory, now State, of Arizona, and is a resident and citizen of said state.

The defendant Midland Oilfields Company, Limited, now is, and at all the times herein mentioned as to it was, a corporation organized under the laws of the State of Delaware, and is a resident and citizen of said state.

The defendant Californian Amalgamated Oil Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of Great Britain, and is a resident and citizen of Great Britain.

The defendants J. L. Campbell, H. M. Jackson and John Shrader now are, and at all the times hereinafter mentioned as to them were, copartners doing business under the firm name of "Ohio Valley Con-

struction Company," their principal place of business located at Chester, State of West Virginia; and each of said last-named defendants is a resident and citizen of said state of West Virginia.

Except as hereinbefore stated each of the defendants herein as a resident and citizen of the State of California.

The defendant Mary F. Francis now is, and at all the times since January 16, 1909, has been, a widow. The defendant J. M. Danziger is the husband of the defendant Daisy C. Danziger. The defendant Wilbert Morgrage is the husband of the defendant Mrs. W. Morgrage. The defendant George L. Reynolds is the husband of the defendant Mrs. George L. Reynolds. The defendant M. P. Waite is the husband of the defendant Anna W. Mary Waite. The defendant A. L. Weil is the husband of the defendant Florence G. [9] Weil. The defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman are sued in their own right, respectively, and also as trustees under a certain purported trust deed hereinafter mentioned.

The defendant Title Insurance and Trust Company is sued in its own right, and also as trustee, under a certain purported mortgage deed hereinafter mentioned.

The defendant M. S. Platz is sued in his own right, and also as trustee under a certain purported trust deed hereinafter mentioned.

Certain of the defendants are described herein otherwise than by Christian name, for the reason that



the Christian name of each of said defendants is unknown to plaintiff.

## II.

The plaintiff now is, and ever since the Treaty of Guadalupe Hidalgo has been, the owner and entitled to the immediate and exclusive possession and enjoyment of all the land next hereinafter described, and of all mineral oil, petroleum, gas and other minerals therein contained, said land being particularly described as follows, to wit: All the southeast quarter of section thirty-two, township twelve north, range twenty-three west, San Bernardino base and meridian, situated in Kern county, State of California. All of said land at all said times has been, and now is, a part of the public domain of the United States, except as withdrawn and reserved from entry as hereinafter alleged. All of said land now is, and at all times has been, oil-bearing land, containing rich deposits of petroleum or mineral oil and gas in commercially paying quantities, and at all times has been, and now is, chiefly valuable for the petroleum or mineral oil and gas deposited therein, and has never contained any minerals other than petroleum or mineral oil and gas. [10]

## III.

On September 14, 1908, the Secretary of the Interior of the United States of America duly and regularly withdrew and reserved the land hereinbefore described (together with other contiguous public lands) from settlement, entry or purchase under the agricultural land laws of the United States for the purpose of examining and classifying said lands.



On June 9, 1909, the land hereinbefore described (together with other contiguous public lands) was duly and regularly classified by the Secretary of the Interior as petroleum—or oil-bearing lands, which said order of classification ever since said last-named date has been, and still is, in full force and effect.

On September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other contiguous public lands) from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States; and since said last-named date none of said land has been subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States.

On July 2, 1910, the President of the United States, under the authority legally invested in him so to do, and especially by virtue of the provisions of the Act of Congress approved June 25, 1910, entitled "An Act to Authorize the President of the United States to Make Withdrawal of Public Lands in Certain Cases" (36 Stat. 847), duly and regularly ratified, affirmed and continued in full force and effect said order of withdrawal and reservation of September 27, 1909, and did further withdraw and reserve all [11] said land from mineral exploration and from all forms of location, settlement, selection, fil-

ing, entry or disposal under the mineral or non-mineral public land laws of the United States, subject only to the provisions of said Act of Congress. Each of said orders of withdrawal and reservation, ever since the dates thereof, respectively, has been, and now is, in full force and effect.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and the lawful orders and proclamations of the President of the United States, the defendants herein, subsequent to January 1, 1910, entered upon the land hereinbefore particularly described, pretended to acquire, and now assert, mineral rights therein, or some part thereof, and have committed and are now committing trespass and waste thereupon, as more particularly hereinafter set forth.

#### IV.

On July 4, 1910, the defendant Consolidated Midway Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon the land hereinbefore described, and thereafter drilled and caused to be drilled an oil well thereupon, and thereafter operated said oil well, and extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

During the month of December, 1910, said defendant Consolidated Midway Oil Company surrendered possession of said oil well to the defendant National Pacific Oil Company, and ever since said last named date the defendant National Pacific Oil Company



wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, has operated and still is operating said oil well, and has drilled and caused to be drilled other oil wells upon said land, and has operated [12] and still is operating said last named oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 4, 1910, each of the defendants American Oilfields Company, Limited, Midland Oilfields Company, Limited, El Dora Oil Company and Miocene Oil Company, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and thereafter has operated and still is operating said oil well or oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 5, 1910, each of the defendants California Amalgamated Oil Company, Pan American Oil Company and Maricopa Consolidated Oil Company, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and is still engaged in drilling an oil well or oil wells upon said land for the purpose of extracting from said land and appropriating to their use, respectively, the petroleum or mineral oil and gas deposited in said land. The plaintiff does not know whether said three last-mentioned defendants or



either of them, have heretofore extracted from said land any petroleum or mineral oil or gas, and has no means of ascertaining the true facts in the premises, except from said defendants; therefore, a full discovery in the premises is sought herein.

The nine defendants last hereinbefore mentioned are hereinafter described collectively as "operators."

[13]

Said operators entered upon said land, drilled oil wells thereupon, and extracted and are extracting petroleum or mineral oil and gas therefrom as aforesaid, claiming the right so to do under and by virtue of one or more of five certain pretended notices of mining location, to wit:

(1) That certain pretended notice of mining location purporting to have been signed by John Conley, Josephine Conley, A. E. Brown, James Hawley, Lillian Hawley, Ira P. Goodwin and Leslie Francis, bearing date January 1, 1907, and recorded January 4, 1907, in book 42 of mining records, at page 121, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Elaine" Placer Mining Claim;

(2) That certain pretended notice of mining location purporting to have been signed by Julius Fried, Parker Barrett, J. M. Dunn, Lena Dunn, Edward Haigh, Emma Haigh, Oma Barrett and W. F. O'Leary (bearing no date), recorded February 3, 1910, in book 80 of mining records, at page 367, in the office of the county recorder of Kern county, California, in which said pretended notice of mining

location said land is described as the "Warrior No. 3" Placer Mining Claim;

(3) That certain pretended notice of mining location purporting to have been signed by Wilbert Morgrage, George L. Reynolds, D. C. Wallace, Jr., Robert F. O'Brien, Mrs. W. Morgrage, J. M. Danziger, Mrs. George L. Reynolds and Daisy C. Danziger (bearing no date), recorded July 19, 1910, in book 86 of mining records, at page 380, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Daisy No. 4" Placer Mining Claim;

(4) That certain pretended notice of mining location purporting to have been signed by T. A. O'Donnell, J. C. Anderson, E. L. Doheny, C. A. Canfield, J. M. Danziger, Norman Bridge, L. McCray and J. E. O'Donnell (bearing no date), recorded October 7, 1910, in book 88 of mining records, at page 149, in the office of the [14] county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "New Era No. 2" Placer Mining Claim;

(5) That certain pretended notice of mining location purporting to have been signed by E. A. Wiltsee, O. E. Monnette, M. J. Monnette, R. P. Davie, J. R. McKinnie, G. G. Gillette, A. E. Perris and Lytle Hull (bearing no date), recorded October 18, 1910, in book 88 of mining records, at page 168, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Standard No. 1" Placer Mining Claim.



By each of said pretended notices of mining location an interest in all of said land and the right to extract minerals therefrom were asserted under the placer mining laws of the United States, and said operators claim under one or more of said pretended notices of mining locations by right of succession from said original pretended locators, or some of them, by virtue of some pretended conveyances, leases or assignments, and not otherwise. The plaintiff does not know definitely under which of said pretended notices of mining location said operators claim, respectively, and, therefore, leaves said defendants to set forth their respective claims of interest.

## V.

No work of exploration or development for the discovery of petroleum, mineral oil or gas, or any other mineral, was ever commenced or prosecuted, in good faith or otherwise, or at all, upon any part of said land under either or any of said placer mining claims hereinbefore described, or otherwise, by or on behalf of said pretended locators, or either or any of them, or any of their alleged successors in interest, or any of the defendants herein, or otherwise, or at all, prior to July 4, 1910.

No discovery of any mineral (other than petroleum or mineral oil and gas) has ever been made in or upon any part of said land. Neither petroleum, mineral oil nor gas was ever discovered [15] in or upon any part of said land prior to October 10, 1910; and because of the premises of this bill, no valid discovery of petroleum, mineral oil or gas



(within the meaning of the mineral land laws of the United States) was ever made in or upon any part of said land.

No valid location or entry of or claim to said land, or any part thereof, under any public land law of the United States, or otherwise, was ever made or acquired by said pretended locators, or either or any of them, or by any of their alleged successors in interest, or by the defendants herein, or either or any of them, or by any person or persons, corporation or corporations, or at all.

Except as set forth in this bill, no claim of any right, title or interest in or to, or lien upon, any of said land, or to the use or possession thereof, or to any of the minerals therein contained, is asserted by or on behalf of any person or persons, corporation or corporations, or at all.

Each and all of the claims asserted by the defendants herein, and each of them, in or to said land, or any part thereof, or the use or possession thereof, or the minerals deposited therein, are based solely upon the pretended placer mining locations hereinbefore described.

Prior to January 1, 1910, no person or association or corporation was a *bona fide* occupant or claimant of any part of said land, engaged in the diligent or other prosecution of work leading to the discovery of oil or gas, or any other mineral.

## VI.

The plaintiff does not know the exact quantity of petroleum, mineral oil or gas extracted from said land and appropriated by the defendants hereinbe-

fore described as “operators,” or any of them as aforesaid, and has no means of ascertaining the true [16] facts in the premises except from the defendants; and, therefore, a full discovery in the premises is sought herein.

Plaintiff is informed and believes, and therefore alleges, that a large part, if not all, of the petroleum or mineral oil and gas extracted from said land and appropriated by said “operators” as aforesaid, was by said “operators,” respectively, sold to the defendants Standard Oil Comapny, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, J. L. Campbell, H. M. Jackson and John Shrader, and was by said last-named defendants, respectively, appropriated to their own use and benefit. The plaintiff does not know the exact quantity of petroleum or mineral oil and gas sold to and appropriated by said last-named defendants, respectively, or either of them, or the price paid therefor, or the profits realized therefrom, and has no means of ascertaining the true facts in the premises except from the defendants herein; therefore, a full discovery in the premises is sought herein.

The plaintiff does not know the exact quantity of petroleum or mineral oil and gas, if any, sold by said “operators,” or any of them, to parties other than as stated above, or the name or names of said purchaser or purchasers, if any, or the price received therefor, or the price realized therefrom, and has no means of ascertaining the true facts in the premises, except from the defendants herein; therefore, a full



discovery in the premises is sought herein.

#### VII.

Each of the defendants hereinbefore described as “operators” now continue and threaten, and unless restrained therefrom will continue, to operate the aforesaid oil wells and extract from said land petroleum or mineral oil and gas in large quantities, and to drill other oil wells upon said land and operate the same and extract from said land petroleum or mineral oil and gas, and otherwise commit trespass and waste upon said land, to the great and irreparable injury of this plaintiff. [17]

#### VIII.

Each of the defendants David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert, F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Thirty Thirty-Two Land Company, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, and Florence G. Weil claims some right, title or interest in said land and the right to extract minerals therefrom under one or more of said pretended notices of mining location, either as original locators thereof, or by virtue of some pretended conveyances, leases or assignments from certain of said pretended locators. The plaintiff does not know definitely the nature or the alleged basis of said claims of interest, and, therefore, leaves said defendants to set forth herein their respective claims of interest.



Each of said defendants last herein named, either directly or through some agent or attorney, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, heretofore entered into possession of some part of said land, and now continues and threatens, and unless restrained therefrom will continue, to hold possession thereof, and further threatens to, and unless restrained therefrom will, drill oil wells thereupon and extract petroleum or mineral oil and gas therefrom, and otherwise commit trespass and waste thereupon, to the great and irreparable injury of this plaintiff.

### IX.

The defendant Title Insurance and Trust Company, claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain instrument in writing dated March 7, 1911, purporting to have been executed by the defendant Consolidated Midway Oil Company, wherein and whereby the [18] defendant Consolidated Midway Oil Company purported to mortgage to said Title Insurance and Trust Company certain of the aforesaid land (together with other land) to secure the payment of a certain indebtedness purported to be owing by said defendant Consolidated Midway Oil Company to the defendant A. B. Coulson, and the defendant A. B. Coulson claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of the instrument last herein described.

The defendant M. S. Platz claims some right, title or interest in or to, or lien upon, said land, or some

part thereof, by virtue of a certain instrument in writing bearing date February 16, 1912, purporting to have been executed by the defendant El Dora Oil Company, wherein and whereby the defendant El Dora Oil Company purported to mortgage to the defendant M. S. Platz certain of said land to secure the payment of a certain indebtedness purported to be owing by the defendant El Dora Oil Company to the defendant John Shrader; and the defendant John Shrader claims some right, title or interest in or to, or lien upon, said land, or upon some part thereof, by virtue of the instrument last herein described.

The defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman claim some right, title or interest in or to said land, or some part thereof, or lien thereupon, individually, and also as trustee for the defendant Thirty Thirty-Two Land Company under some pretended conveyance or deed of trust, the particulars whereof are unknown to plaintiff; and the defendants Thirty Thirty-Two Land Company claims some right, title or interest in or to said land, or some part thereof, or lien thereupon, by virtue of said pretended conveyance or deed of trust.

The defendant General Petroleum Company claims some right, title or interest in or to said land, or lien thereupon, under some pretended conveyance, assignment or other instrument purporting [19] to have been executed by the defendant Thirty Thirty-Two Land Company or by some of the other defendants named herein, the particulars



whereof are unknown to plaintiff.

X.

The defendant J. M. Dunn claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded November 17, 1910, in book 4 of attachments, at page 402, in the records of Kern county, California,

The defendant C. S. Green claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded November 22, 1911, in book 5 of attachments, at page 132, in the records of Kern county, California.

The defendant T. J. Green claims some right, title or interest in or to, or lien upon said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded February 28, 1912, in book 5 of attachments, at page 227, in the records of Kern county, California.

The defendant H. H. Hair claims some right, title or interest in or to, or lien upon said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded January 3, 1912, in book 5 of attachments, at page 174, in the records of Kern county, California.

The defendant King Lumber Company claims some right, title or interest in or to, or lien upon,



said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded February 16, 1912, in book 5 of attachments, at page 217, in the records of Kern county, California.

The defendant Layne and Bowler Company of California claims some right, title or interest in or to, or lien upon, said land, [20] or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded June 19, 1912, in book 5 of attachments, at page 291, in the records of Kern county, California.

The defendant Sesame Oil Company claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded May 5, 1911, in book 4 of attachments, at page 489, in the records of Kern county, California.

The defendant Archibald York claims some right, title or interest in or to said land, or some part thereof, by virtue of a certain sheriff's certificate of the sale of said land, or some part thereof, recorded October 11, 1911, in book 3 of certificates of sale, at page 214, in the records of Kern county, California.

## XI.

Except as in this bill stated, plaintiff has no knowledge or information concerning the exact nature or alleged basis of any of the claims asserted by the defendants herein, or any of them; and, therefore, leaves said defendants to set forth their respective claims of interest.

In that behalf plaintiff alleges that, because of the premises of this bill, none of the defendants have or ever had any right, title or interest in or to, or lien upon, said land, or any part thereof, or any right or interest in or to the petroleum or minineral oil or gas deposited therein, or any right to extract petroleum or mineral oil or gas, or any other mineral from said land, or any part thereof. On the contrary, each of said pretended placer mining locations is, and at all times has been, void and of no effect; and no rights whatever were ever acquired thereunder; and each and all of the aforesaid acts of the defendants herein in asserting an interest in or to said land, and in entering upon and taking and holding possession thereof, and in drilling and constructing oil wells thereupon, and in extracting, using and appropriating the petroleum or mineral oil and gas deposited [21] therein, were and are in violation of the laws of the United States and the aforesaid orders withdrawing and reserving said land, and all of said acts were and are in violation of the proprietary and other rights of this plaintiff.

## XII.

The present value of the land hereinbefore described exceeds one million (1,000,000) dollars.

In consideration whereof, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That said defendants, and each of them, may be required to make full, true and direct answer, respectively, to all and singular the matters and things



hereinbefore stated and charged and to fully disclose and state their claims to said land hereinbefore described, and to any and to all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived;

2. That the said land may be declared by this Court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States;

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land, or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land, or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them; [22]

4. That each and all of the defendants herein, their officers agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land or any part thereof, or in or to any of the minerals, or mineral deposits therein, or there-



under contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and premises and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof;

5. That an accounting may be had by said defendants and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted or received by them or either or any of them, from said land, or any part thereof, and of any and all moneys or other property or thing of value received from the sale or disposition of any and all minerals extracted from said land or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract or agreement concerning said land or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises; [23]

6. That a receiver may be appointed by this court to take possession of said land and of all wells, der-

ricks, drills, pumps, storage vats, pipes, pipe-lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land or any part thereof for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals, and for the preservation, protection and use of the wells, derricks, pumps, tanks, storage vats, pipes, pipe-lines, houses, shops, tools, machinery and appliances being used by the defendants, their officers, agents or assigns in the production, transportation, manufacture or sale of petroleum or other minerals from said land or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery;

7. That the plaintiff may have such other and further relief as in equity may seem just and proper.

To the end therefore that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to the said defendants herein, to wit: American Oilfields Company, Limited, Midlands Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consoli-



dated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, [24] Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there severally, full, true and direct answers make to all and singular the premises but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by such order, direction and decree as may be made against them, or any of them, in the prem-



ises and shall be meet and agreeable to equity.

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,

United States Attorney.

B. D. TOWNSEND,

Special Assistant to the Attorney General. [25]

United States of America,

Southern District of California,

County of Los Angeles,—ss.

Gratz W. Helm, being first duly sworn, deposes and says:

I am now, and have been for more than four years last past, an employee and agent of the General Land Office, Department of the Interior of the United States; at all times from and after the 1st day of July, 1910, I have been, and am now, Chief of Field Division of the General Land Office of the United States, assigned to duty and in charge of the public lands of the said United States, comprised in the Sixth Field Division in the Southern District of California, including the land described in the foregoing bill of complaint. During all of said times hereinbefore mentioned, under such employment, I have been engaged in field examinations and other investigations on behalf of the Department of the Interior, with reference to the administration of the public land laws of the United States and the enforcement and protection of the proprietary and other rights of the United States pertaining to said public lands. The acts and transactions referred to in the foregoing bill of complaint with reference to

said land in paragraph II thereof described, were investigated by me, as such employee and agent, and under my supervision, direction and control, and in this manner I acquired knowowledge thereof. The same are true of my own knowledge, except as to the statements therein made on information and belief, and as to those matters, I believe them to be true.

My knowledge of the facts upon which the prayer for temporary relief by injunction and receivership in said bill is based, was obtained from an inspection of the records of the United States Land Office for the Los Angeles Land District, the records of the office of the county recorder, county of Kern, California, and an inspection and observation of the land described [26] in said bill of complaint, and operations conducted in and upon said land, and upon admissions and statements made by certain of the defendants and their duly authorized officers and agents.

(Signed) GRATZ W. HELM.

Subscribed and sworn to before me this 27th day of February, 1913.

[Seal] (Signed) WM. M. VAN DYKE,  
Clerk of the U. S. District Court for the Southern  
District of California, Southern Division.  
Division.

[27]

**[Motion to Dismiss Bill of Complaint.]**

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

AMERICAN OILFIELDS COMPANY, LIM-  
ITED et al.

Defendants.

To the Honorable, the District Court of the United  
States for the Southern District of California,  
Northern Division, Ninth Circuit:

Defendants, American Oilfields Company, Limited; Midland Oilfields Company, Limited, National Pacific Oil Company, Consolidated Midway Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Thirty Thirty-two Land Company, David S. Bachman, Daisy C. Danziger, J. M. Danziger, Edward Fox, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil, hereby move that the Bill of Complaint in the above-entitled action and the whole thereof be dismissed for insufficiency of fact to constitute a valid cause



of action in equity against the defendants in this: That it appears from said Bill of Complaint that defendants' grantors located said land prior to July 2d, 1910, and under said location defendants entered into the actual possession of said land, and made a discovery of mineral thereon, and that it is not alleged that prior to July 2d, 1910, and on said date defendants were not in the diligent [28] prosecution of work leading to discovery of oil or gas;

That the basis of plaintiff's cause of action depends on an alleged withdrawal of said land on the 27th day of September, 1909, by the President of the United States acting by and through the Secretary of the Interior, and that the alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void and of no force and effect, and beyond the authority of the President and contrary to the provisions of Chapter 6, Title 32 of the Revised Statutes of the United States and the Act of Congress of February 11, 1897, 27 Stat. L. 526 and the Acts amending and supplementing the same;

That it further appears that no withdrawal of the minerals in said land was ever made.

That it appears that this is an action to quiet title, but it is not alleged that plaintiff is in the possession of said land or any part thereof; to the contrary it is alleged that defendants are in possession of the whole thereof;

That it further appears in said Bill of Complaint that defendants by their efforts and expenditures over several years have established the value of said

lands to an amount exceeding \$500,000.00 which were theretofore valueless; that plaintiff seeks the recovery of the land and the improvements thereof, and the oil removed therefrom, without offering to pay for the said improvements or the cost of producing said oil, or to make any allowance therefor;

That it further appears from said Bill of Complaint that [29] plaintiff is seeking the interposition of a court of equity without offering to do equity.

A. L. WEIL,

Solicitor for Defendants, American Oilfields Company, Ltd., Midland Oilfield Co., Ltd., National Pacific Oil Co., Consolidated Midway Oil Co., Pan American Oil Company, Maricopa Consolidated Oil Co., General Petroleum Company, Thirty Thirty-Two Land Co., David S. Bachman, Daisy C. Danziger, J. M. Danziger, Edward Fox, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, Florence G. Weil.

[Endorsed]: No. A-3—In Equity. U. S. District Court, Southern District of California, Northern Division, Ninth Circuit, The United States of America, Plaintiff, vs. American Oilfields Company et al., Defendants. Motion to Dismiss. Received a Copy of this Within Motion to Dismiss this 20th day of May, 1913. A. I. McCormick, U. S. Atty. Filed



May 20, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. A. L. Weil, Attorney at Law, 1206 Alaska Commercial Bldg., San Francisco, Cal. [30]

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*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,  
Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED, Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Dan-



ziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, and Florence G. Weil,

Defendants.

**Order Overruling Motions to Dismiss, and  
Appointing Receiver.**

WHEREAS, motions to dismiss the bill of complaint in this suit were made by certain of the defendants herein, and were on January 3, 1914, and again on March [31] 21, 1914, were fully argued and submitted; and

WHEREAS, motions by the complainant for the appointment of a Receiver for the interests of the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Shrader, M. S. Platz, American Oilfields Company, Limited, Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil, in the land described in the bill of complaint herein, together with all oil and other property on said land were on March 21, 1914, argued and submitted:

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that the motions of the defendants herein to dismiss are hereby overruled and denied, and each of the said defendants who made said mo-

tions to dismiss is allowed five days to file answer in addition to the time allowed by the New Equity Rules.

IT IS FURTHER ORDERED that A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Shrader, M. S. Platz, American Oilfields Company, Limited, Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil, to wit:

All the Southeast Quarter of Section Thirty-Two, Township Twelve North, Range Twenty-three West, San Bernardino Base and Meridian, situated in Kern County, State of California,  
[32]

and of the oil, gas, and all other property of every kind situated on said land, or already extracted therefrom and still in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property, or any part thereof from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of



any person or corporation for them which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable. [33]

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of



them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hands as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver and by said solicitors of record, or otherwise as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars, to be approved by this Court, shall be given by the Receiver within five days from the filing of this order; [34] provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond.

The amount of compensation to be paid to the Receiver in this suit is to be determined hereafter.

This April 23, 1915.

M. T. DOOLING,  
United States District Judge.

[Endorsed]: No. A-3—Eq. U. S. District Court, Southern District of California, Northern Division. United States of America v. American Oilfields Co. et al. Order Overruling Motions to Dismiss and Appointing Receiver. Filed Apr. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [35]

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*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,  
Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J.



Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil,

Defendants.

**Petition for Order Allowing Appeal.**

National Pacific Oil Company, a corporation, defendant herein, conceiving itself aggrieved by the Order given and rendered on the 23d day of April, 1915, and filed on the 26th day of [36] April, 1915, in the above-entitled action, doth hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that part of said order, a copy of which said order is hereto annexed, which orders that:

“IT IS FURTHER ORDERED that A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Shrader, M. S. Platz, American Oilfields Company, Limited, Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil



Company, Maricopa Consolidated Oil Company, and A. L. Weil, to wit:

All the Southeast Quarter of Section Thirty-two, Township Twelve North, Range Twenty-three West, San Bernardino Base and Meridian, situated in Kern County, State of California, and of the oil, gas, and all other property of every kind situated on said land, or already extracted therefrom and in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property, or any part thereof, from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation [37] for them which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells if he deems it necessary or advis-

able to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, [38] and for the purpose of protecting and operating the said property the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hands as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Re-



ceiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver and by said solicitors of record, or otherwise as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars, to be approved by this Court, shall be given by the Receiver within five days from the filing of this order; provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond."

And defendant prays that this, its appeal, may be allowed; and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Dated 20th May, 1915.

A. L. WEIL,  
Solicitor for Defendant, National Pacific Oil Company.

[Endorsed]: No. A-3—In Equity. District Court of The United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus American Oilfields Company, Limited, et al., Defendants. Petition for Order Allowing Appeal. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for



Defendant National Pacific Oil Company, Alaska  
Commercial Bldg., San Francisco, California. [39]

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*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,

Midland Oilfields Company, Limited, El Dora  
Oil Company, National Pacific Oil Company,  
Miocene Oil Company, Consolidated Midway  
Oil Company, Californian Amalgamated Oil  
Company, Pan American Oil Company, Mari-  
copa Consolidated Oil Company, General Pe-  
troleum Company, Independent Oil Produc-  
ers Agency, Phoenix Refining and Manufac-  
turing Company, Standard Oil Company, Title  
Insurance and Trust Company, King Lumber  
Company, Layne and Bowler Company of  
California, Sesame Oil Company, Thirty  
Thirty-two Land Company, J. L. Campbell,  
H. M. Jackson, John Shrader, A. B. Coulson,  
M. S. Platz, J. M. Dunn, C. S. Green, T. J.  
Green, H. H. Hair, Archibald York, David  
S. Bachman, James Bloom, Daisy C. Danziger,  
J. M. Danziger, Edward Fox, Mary F. Fran-  
cis, George C. Haldeman, John V. Hoffman,  
M. E. Hoffman, Benjamin M. Howe, Wilbert

Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil,

Defendants.

### **Assignment of Errors.**

National Pacific Oil Company, a corporation, defendant and appellant herein, having appealed, or being about to appeal, [40] from that certain Order made in the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit, on the 23d day of April, 1915, in an action pending in said court in which the United States of America was plaintiff and the said National Pacific Oil Company, a corporation, and others, were defendants, by which said order a Receiver was appointed to take charge of the property of defendants, and each of them, says, that in the records and proceedings in the said court in the said action, there are manifest errors, and assigns the following as its assignment of errors upon the said appeal:

#### **I.**

That said District Court erred in making said Order and appointing a Receiver;

#### **II.**

That said District Court, in making said order, erred in this, that said court had not, nor had the Judge thereof, any jurisdiction to make the said order;

III.

That said District Court erred, in making said order in this, that the said court abused its discretion and permitted an abuse of discretion in making said order;

IV.

That said District Court erred, in making said order, in that the complaint of plaintiff in said action did not show facts justifying the appointment of a Receiver;

V.

That said District Court erred, in making said order, in that the complaint of plaintiff in the said action fails to [41] state any facts entitling the plaintiff herein to any equitable relief whatsoever.

VI.

That said District Court erred, in making said order, in authorizing and directing the Receiver to take possession of the property mentioned in said order.

VII.

That said District Court erred, in making said order, in this, that defendant at that time and long prior thereto was in the actual and peaceable possession of said property, claiming and holding the same under and by virtue of the laws of the United States, and that in and by the allegations of plaintiff's complaint herein, it appears that the plaintiff was and is out of possession. That it does not appear of record herein that an ancillary suit for the appointment of a Receiver had ever been commenced or brought by plaintiff against defendant. That



plaintiff had and has a plain, speedy and adequate remedy at law, and said District Court, sitting as a Court of Equity herein, was and is without authority or jurisdiction to make said order.

In order that the foregoing assignment of errors may be and appear of record, the appellant above named presents the same to this Court, and prays that such disposition may be made thereof as by the law and statutes of the United States in such case is made and provided.

A. L. WEIL,

Solicitor for Defendant and Appellant, National Pacific Oil Company.

[Endorsed]: No. A-3—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus American Oilfields Company, Limited, et al., Defendants. Assignment of Errors. A. L. Weil, Solicitor for Defendant, National Pacific Oil Company, Alaska Commercial Bldg., San Francisco, California. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [42]

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,

Midland Oilfields Company, Limited, El Dora  
Oil Company, National Pacific Oil Company,  
Miocene Oil Company, Consolidated Midway  
Oil Company, Californian Amalgamated Oil  
Company, Pan American Oil Company, Mari-  
copa Consolidated Oil Company, General Pe-  
troleum Company, Independent Oil Produc-  
ers Agency, Phoenix Refining and Manufac-  
turing Company, Standard Oil Company, Title  
Insurance and Trust Company, King Lumber  
Company, Layne and Bowler Company of  
California, Sesame Oil Company, Thirty  
Thirty-two Land Company, J. L. Campbell,  
H. M. Jackson, John Shrader, A. B. Coulson,  
M. S. Platz, J. M. Dunn, C. S. Green, T. J.  
Green, H. H. Hair, Archibald York, David  
S. Bachman, James Bloom, Daisy C. Danziger,  
J. M. Danziger, Edward Fox, Mary F. Fran-  
cis, George C. Haldeman, John V. Hoffman,  
M. E. Hoffman, Benjamin M. Howe, Wilbert  
Morgrage, Mrs. W. Morgrage, Robert F.

O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil,

Defendants.

**Order Allowing Appeal, and Fixing Bond.**

On motion of A. L. Weil, Esq., counsel for defendant, [43] National Pacific Oil Company, a corporation, and on filing the petition of said defendant for an order allowing an appeal, together with an assignment of errors, IT IS ORDERED that an appeal be and is hereby allowed, to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order given and made herein on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit, appointing a Receiver to take charge of the property of defendants, and each of them.

That the amount of the bond upon said appeal be and is hereby fixed at the sum of \$ ——— if the writ of supersedeas is desired.

That upon the execution and approval of said bond by this Court, a writ of supersedeas issue under the seal of this Court, directed to plaintiff herein, its agents and servants, and the Receiver appointed herein under said order, that they desist and refrain from, in any manner, interfering with the Southwest quarter of said property, or in any manner enforcing or attempting to enforce said order of the 23d day of April, 1915, against defendant, National Pacific Oil Company, until said appeal be heard and de-



terminated, or the further order of this Court. If a Supersedeas is desired Appellant may apply therefor to the Court of Appeals.

Dated 21st of May, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: No. A-3—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus American Oilfields Company, Limited, et al., Defendants. Order Allowing Appeal and Fixing Bond. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant National Pacific Oil Company, Alaska Commercial Bldg., San Francisco, California. [44]

**[Bond on Appeal.]**

KNOW ALL MEN BY THESE PRESENTS, that we, National Pacific Oil Company as principal, and G. J. Syminton and R. E. Maynard, as sureties, are held and firmly bound unto The United States of America in the full and just sum of Five Hundred Dollars, to be paid to the said The United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of May, in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS, lately at a District Court of the

United States for the Southern District of California, Northern Division, 9th Circuit, in a suit depending in said court, between The United States of America, Plaintiff, vs. American Oilfields Company, Limited, et al., in which an order overruling motion to dismiss, and appointing a Receiver was rendered against the National Pacific Oil Company and the said National Pacific Oil Company having obtained from said Court an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said The United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California;

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said National Pacific Oil Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be [45] void; else to remain in full force and virtue.

NATIONAL PACIFIC OIL COMPANY. (Seal)

E. B. KIDSON, (Seal)

Secretary.

G. J. SYMINTON. (Seal)

R. E. MAYNARD. (Seal)

Acknowledged before me the day and year first above written.

[Seal]

BERTHA L. MARTIN,

Notary Public in and for the County of Los Angeles,  
State of California.

United States of America,  
Northern District of California.—ss.

G. J. Syminton and R. E. Maynard being duly sworn, each for himself, deposes and says, that he is a freeholder in said district, and is worth the sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

G. J. SYMINTON.

R. E. MAYNARD.

Subscribed and sworn to before me, this 21st day of May, A. D. 1915.

[Seal]

BERTHA L. MARTIN,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. A-3—In Equity. United States District Court for the Southern District of California, Northern Division, Ninth Circuit. The United States of America vs. American Oilfields Company, Ltd., et al. Bond on Appeal of National Pacific Oil Company. Form of bond and sufficiency of sureties approved. M. T. Dooling, Judge. Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [46]



UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Northern Division.*

CLERK'S OFFICE.

No. A-3—EQ.

THE UNITED STATES OF AMERICA,

vs.

AMERICAN OILFIELDS CO., LTD., et al.

**Praeipie [for Transcript of Record on Appeal].**

To the Clerk of Said Court:

Sir: Please issue Transcript of Record on Appeal of Defendant, National Pacific Oil Company, in the above-entitled case, containing copies of the following papers therein, viz:

1. Bill of Complaint;
2. Motion of Said Defendant to Dismiss Bill of Complaint;
3. Order Overruling Motion to Dismiss and Appointing Receiver;
4. Petition for Order Allowing Appeal, Omitting Therefrom Copy of Order Overruling Motion to Dismiss, etc., Attached Thereto;
5. Assignment of Errors;
6. Order Allowing Appeal, and Fixing Bond; and
7. Bond on Appeal.

A. L. WEIL,

Solicitor for National Pacific Oil Co.

[Endorsed]: No. A-3—Eq. U. S. District Court,  
Southern District of California, Northern Division

United States vs. American Oilfields Co., Ltd., et al.  
Praecipe for Transcript on Appeal of National Pacific Oil Co. Filed Aug. 25, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.  
[47]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record on Appeal.]**

*In the District Court of the United States, in and for  
the Southern District of California, Northern  
Division.*

No. A-3—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED, Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S.

Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing forty-seven (47) typewritten pages, numbered from 1 to 47, inclusive, and comprised in one (1) volume, to be a full, true and correct copy [48] of the Bill of Complaint, Motion to Dismiss Bill of Complaint, Order Overruling Motion to Dismiss and Appointing Receiver, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Bond, Bond on Appeal, and Praecipe for Transcript in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the Defendant and Appellant, National Pacific Oil Company, by its solicitor of record.

I do further certify that the cost of the foregoing record is \$27.25, the amount whereof has been paid



me by the National Pacific Oil Company, the appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 8th day of September, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,  
Clerk of the District Court of the United States of  
America, in and for the Southern District of  
California.

By Leslie S. Colyer,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp Canceled  
9/8/15. L. S. C.] [49]

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[Endorsed]: No. 2657. United States Circuit Court of Appeals for the Ninth Circuit. National Pacific Oil Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed September 21, 1915.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

**[Order Allowing Appellant to and Including August  
19, 1915, to File Transcript on Appeal.]**

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

No. A-3—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

AMERICAN OILFIELDS COMPANY, Ltd., et al.,

Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant National Pacific Oil Company have sixty (60) days additional and further time from the 20th day of June, 1915, within which to file its transcript on appeal in the above-entitled suit with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated June 16, 1915.

M. T. DOOLING,

Judge of the District Court.

[Endorsed]: No. A-3—Equity. U. S. District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff and Respondent, vs. American Oilfields Company et al, Defendants and Appellants. Order Extending Time to File Transcript on Appeal. Filed Jun. 17, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

No. 2657. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 15, 1915, to File Record Thereof and to Docket Case. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 21, 1915. F. D. Monckton, Clerk.

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**[Order Allowing Appellant to and Including October 18, 1915, to File Transcript on Appeal.]**

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

No. A-3—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

AMERICAN OILFIELDS COMPANY, Ltd., et al.,  
Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant National Pacific Oil Company have sixty (60) days further time in addition to the time heretofore allowed, within which to file its transcript on appeal in the above-entitled suit with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated August 16, 1915.

ROSS,  
Circuit Judge.



[Endorsed]: No. 2657. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, vs. American Oilfields Company, Ltd., et al. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 21, 1915. F. D. Monckton, Clerk.

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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NATIONAL PACIFIC OIL COMPANY, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Northern Division. •

Filed

NOV 1 - 1915

F. D. Monckton,  
Clerk.





No. 2658

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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NATIONAL PACIFIC OIL COMPANY, a Corporation,

Appellant,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Northern Division.

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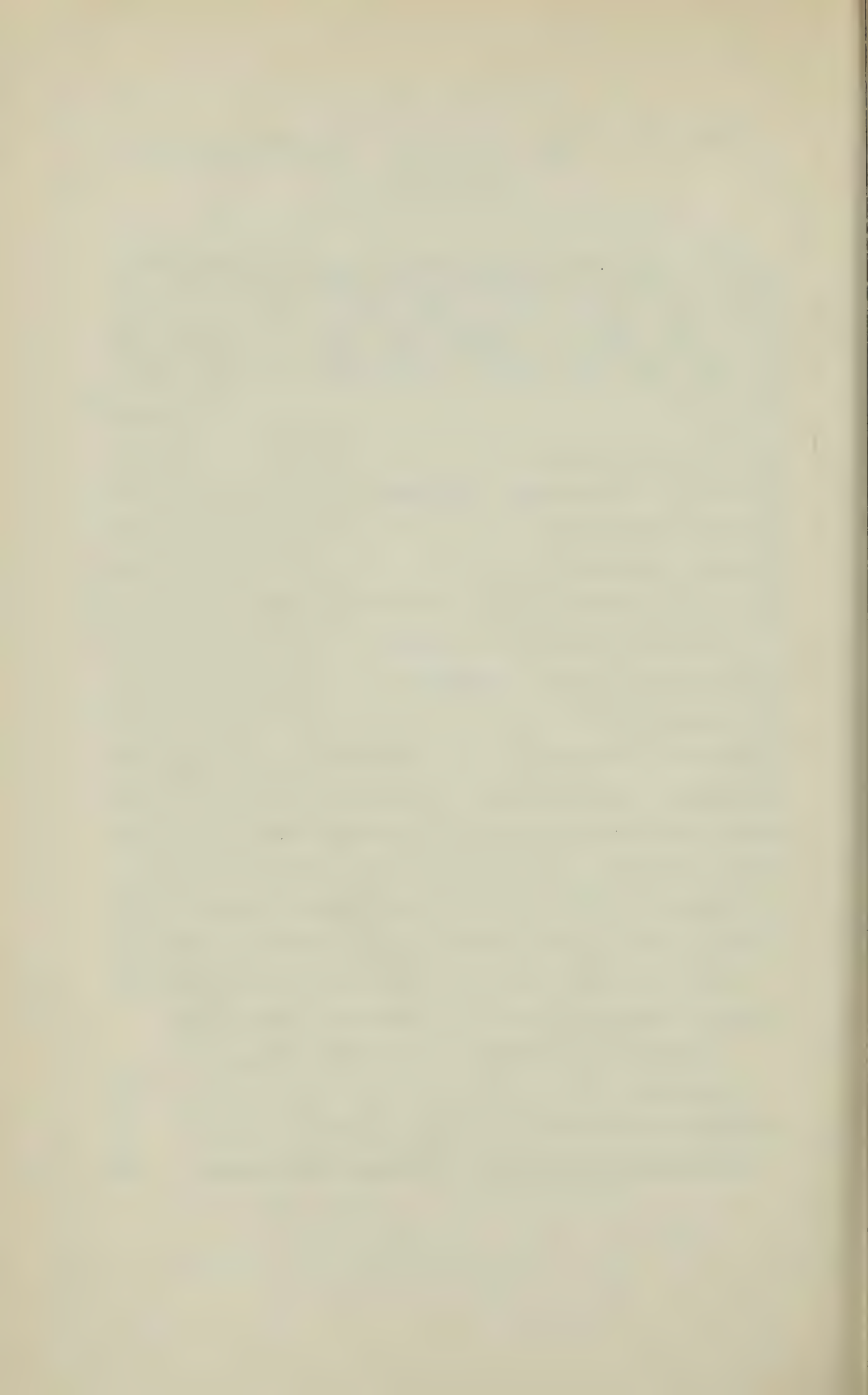
INDEX TO THE PRINTED TRANSCRIPT OF  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

For Appellant:

A. L. WEIL, Esq., 1206 Alaska Commercial Building, San Francisco, California.

For Appellees:

THOMAS W. GREGORY, Esq., Attorney-General of the United States, Washington, D. C.;

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California; and

E. J. Justice, Esq., Special Assistant to the Attorney-General, Postoffice Building, San Francisco, California, [3\*]

**[Citation on Appeal (Original).]**

UNITED STATES OF AMERICA,—SS

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Southern District of California, Northern Division, Ninth Circuit, wherein the National Pacific Oil Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy

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\*Page-number appearing at foot of page of certified Transcript of Record.

justice should not be done to the parties in that behalf.

Witness, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 21st day of May, A. D. 1915.

M. T. DOOLING,

United States District Judge. [4]

Service accepted this 26 day of May, 1915.

E. J. JUSTICE.

P.

United States of America,—ss.

On this 26th day of May, in the year of our Lord one thousand nine hundred and fifteen, personally appeared before me, Flora Hall, Notary Public in and for the City and County of San Francisco, the subscriber, Charles M. Weile, and makes oath that he delivered a true copy of the within citation to United States of America, delivered to E. J. Justice, solicitor for the within named plaintiff.

CHARLES M. WEILE.

Subscribed and sworn to before me at San Francisco, Cal., this 26th day of May, A. D. 1915.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 47—In Equity. United States District Court for the Southern District of California, Northern Division, Ninth Circuit. National Pacific Oil Company, Appellant, vs. The United States of America. Citation on Appeal Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.



*In the District Court of the United States, in and for  
the Southern District of California, Northern  
Division.*

No. 47—CIVIL.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

MIDWAY NORTHERN OIL COMPANY, a Corporation, Los Angeles-McKittrick Oil Company, a corporation, Consolidated Midway Oil Company, a corporation, National Pacific Oil Company, a corporation, Maricopa Northern Oil Company, a corporation, Thirty Thirty-two Land Company, a corporation, General Petroleum Company, a corporation, Standard Oil Company, a corporation, Tarr & McComb, Inc., a corporation, Layne & Bowler Company of California, a corporation, Title Insurance & Trust Company, a corporation, Maricopa Consolidated Oil Company, a corporation, Southern Investment Company, a corporation, El Dora Oil Company, a corporation, King Lumber Company, a corporation, Sesame Oil Company, a corporation, Mary F. Francis, a widow, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M. Danziger, Daisy C. Danziger,

*National Pacific Oil Company vs.*

A. L. Weil, Florence C. Weil, A. B. Coulson,  
E. A. Wiltsee, G. G. Gillette, Sydney Smith, J.  
R. McKinnie, Orra E. Monnette, M. J. Mon-  
nette, R. P. Davie, Julius Fried, Parker Bar-  
rett, Oma Barrett, J. M. Dunn and Lena  
Dunn,

Defendants. [5]

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*In the District Court of the United States for  
the Southern District of California, Northern  
Division, Ninth Circuit.*

No. 47—CIVIL—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

MIDWAY NORTHERN OIL COMPANY, a Corpo-  
ration, et al.,

Defendants.

**Bill of Complaint.**

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,  
United States Attorney.

Filed Jan. 23, 1913. Wm. M. Van Dyke, Clerk.  
By Chas. N. Williams, Deputy Clerk. [6]

*In the District Court of the United States for the  
Southern District of California, Northern Divi-  
sion, Ninth Circuit.*

NO. 47—CIVIL—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

MIDWAY NORTHERN OIL COMPANY, a Corpo-  
ration, Los Angeles-McKittrick Oil Company,  
a corporation, Consolidated Midway Oil Com-  
pany, a corporation, National Pacific Oil Com-  
pany, a corporation, Maricopa Northern Oil  
Company, a corporation, Thirty Thirty-two  
Land Company, a corporation, General Petro-  
leum Company, a corporation, Standard Oil  
Company, a corporation, Tarr & McComb,  
Inc., a corporation, Layne & Bowler Company  
of California, a corporation, Title Insurance  
& Trust Company, a corporation, Maricopa  
Consolidated Oil Company, a corporation,  
Southern Investment Company, a corporation,  
El Dora Oil Company, a corporation, King  
Lumber Company, a corporation, Sesame Oil  
Company, a corporation, Mary F. Francis, a  
widow, L. W. Lowell, James Bloom, William  
S. Kimball, Harry V. Massena, Arthur Whit-  
field, Maude Whitfield, James E. Stone, John  
V. Hoffman, M. E. Hoffman, Edward Fox,  
Charles A. Son, David S. Bachman, William  
R. Dunn, T. J. Green, M. P. Waite, Anna M.  
Waite, J. M. Danziger, Daisy C. Danziger,



A. L. Weil, Florence C. Weil, A. B. Coulson,  
E. A. Wiltsee, G. G. Gillette, Sydney Smith, J.  
R. McKinnie, Orra E. Monnette, M. J. Mon-  
nette, R. P. Davie, Julius Fried, Parker Bar-  
rett, Oma Barrett, J. M. Dunn and Lena  
Dunn,

Defendants.

To the Judges of the District Court of the United  
States for the Southern District of California,  
sitting within and for the Northern Division of  
said District: [7]

The United States of America, by George W.  
Wickersham, its attorney general, presents this, its  
bill of complaint, against Midway Northern Oil Com-  
pany, a corporation; Los Angeles-McKittrick Oil  
Company, a corporation; Consolidated Midway Oil  
Company, a corporation; National Pacific Oil Com-  
pany, a corporation; Maricopa Northern Oil Com-  
pany, a corporation; Thirty Thirty-two Land Com-  
pany, a corporation; General Petroleum Company,  
a corporation; Standard Oil Company, a corporation;  
Tarr & McComb, Inc., a corporation; Layne & Bowler  
Company of California, a corporation; Title Insur-  
ance & Trust Company, a corporation; Maricopa  
Consolidated Oil Company, a corporation; Southern  
Investment Company, a corporation; El Dora Oil  
Company, a corporation; King Lumber Company, a  
corporation; Sesame Oil Company, a corporation;  
Mary F. Francis, a widow; L. W. Lowell, James  
Bloom, William S. Kimball, Harry V. Massena, Ar-  
thur Whitfield, Maude Whitfield, James E. Stone,  
John V. Hoffman, M. E. Hoffman, Edward Fox,

Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M. Danziger, Daisy C. Danziger, A. L. Weil, Florence G. Weil, A. B. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn, defendants, and citizens and residents, respectively, of the places in the next succeeding paragraph of this bill set forth, and in that behalf the plaintiff complains and alleges:

I.

Defendant Midway Northern Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under the laws of the former territory, now state of Arizona, and a resident and citizen of said state, [8] with an office for the transaction of business within the southern district of California.

Defendant Los Angeles-McKittrick Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the former territory, now state, of Arizona, and a resident and citizen of said state, with an office for the transaction of business at the city of Los Angeles, California.

Defendant Consolidated Midway Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the former territory, now state, of Arizona, and a resident and citizen of said state, with an office for the transac-



tion of business at the City of Los Angeles, California.

Defendant National Pacific Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state, with its office and principal place of business at Los Angeles, California.

Defendant Maricopa Northern Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of former territory, now state of Arizona, and a resident and citizen of said state, with an office for the transaction of business at the City of Los Angeles, California.

Defendant Thirty Thirty-two Land Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state with its office and principal place of business at Los Angeles, California. [9]

Defendant General Petroleum Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state, with an office for the transaction of business at the City of Los Angeles.

Defendant Standard Oil Company now is, and at all of the times hereinafter mentioned as to it was,



a corporation organized and existing under the laws of the State of California, and a resident and citizen of said state, with its office and principal place of business at Los Angeles, California.

Defendant Tarr & McComb, Inc., now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state, with its principal place of business at Los Angeles, California.

Defendant Layne & Bowler Company of California now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state, with its principal place of business at Los Angeles, California.

Defendant Title Insurance & Trust Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state, with its principal place of business at Los Angeles, California.

Defendant Maricopa Consolidated Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the formre territory, now state, of Arizona, and a resident [10] and citizen of said state, with an office for the transaction of business at the city of Los Angeles, California.

Defendant Southern Investment Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state, with its principal place of business at Los Angeles, California.

Defendant El Dora Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the former territory, now state, of Arizona, and a resident and citizen of said state, with an office for the transaction of business at Los Angeles, California.

Defendant King Lumber Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the State of California, and a resident and citizen of said state.

Defendant Sesame Oil Company now is, and at all of the times hereinafter mentioned as to it was, a corporation organized and existing under and by virtue of the laws of the state of California, and a resident and citizen of said state.

Defendant Mary F. Francis now is, and at all times since the 16th day of January, 1909, has been, a widow, and a resident and citizen of the State of California.

Each of the defendants, other than the defendants heretofore in this paragraph specifically named and mentioned, is a resident and citizen of the State of California.

Plaintiff is informed and believes, and therefore al-



leges that defendants Arthur Whitfield and Maude Whitfield are husband and wife, defendants John V. Hoffman and M. E. Hoffman are husband and wife, defendants M. P. Waite and Anna M. Waite are husband [11] and wife, defendants J. M. Danziger and Daisy C. Danziger are husband and wife, defendants A. L. Weil and Florence G. Weil are husband and wife, defendants Parker Barrett and Oma Barrett are husband and wife, defendants J. M. Dunn and Lena Dunn are husband and wife.

Certain of the defendants are described herein otherwise than by their christian names for the reason that the christian names of said defendants are unknown to the plaintiff.

## II.

For more than fifty years last past, this plaintiff, the United States of America, has continuously been and now is the sole and exclusive owner in fee of the following described real property, land and premises situated in the county of Kern, State of California, and more particularly described as follows, to wit:

The northwest quarter of Section thirty-two, Township twelve north, Range twenty-three west, San Bernardino meridian, and of the mineral oil, petroleum, asphaltum, gas and all minerals and substances therein or thereunder contained. This plaintiff, the United States of America, is now and has been continuously, during all of the said time last hereinbefore mentioned, entitled to the full, free and exclusive possession of said real property, land and premises, and of all minerals and substances



contained therein or thereunder.

### III.

Except as hereinafter mentioned, said described land and premises and the whole thereof, was at all times in this bill mentioned, and is now, public land of this plaintiff, and a portion of the public domain of the United States. Said land and premises contains mineral oil, commonly known as petroleum, in large and paying quantities, and is oil-bearing land, [12] chiefly valuable for, and on account of, the mineral oil or petroleum therein contained. Said land is of the value of five thousand dollars per acre, said value being based on the mineral oil or petroleum therein contained. Said land and premises has not now, nor has it at any time had, any value whatever for any other mineral than mineral oil or petroleum, said mineral oil or petroleum being the only mineral therein contained.

### IV.

No valuable mineral other than mineral oil or petroleum has ever at any time been discovered in or on or under said land and premises or any part thereof.

No discovery of mineral oil or petroleum or gas was or ever had been made in or under said land and premises or any part thereof at any time prior to the 6th day of July, 1910. On said last-mentioned date mineral oil or petroleum was for the first time found in paying quantities in and under said land and premises at a depth of about two thousand feet, as is hereinafter fully set forth.

### V.

No valid location or entry of or claim to said land

and premises or any part thereof, under any law of the United States providing for the location, entry or disposal of the mineral or nonmineral public lands of the United States, was ever at any time prior to the 27th day of September, 1909, made by the defendants herein or by any of them or by any other person or persons or at all.

Each and every and all of the claims of the defendants herein and of each of them, of, in or to said land and premises or the mineral oil, petroleum or gas contained therein or thereunder are based solely upon pretended placer mining locations [13] claimed to have been made under and by virtue of the laws of the United States relating to placer mining claims having for their object the development of said land and premises as oil and petroleum bearing land and not as containing any other mineral or minerals. Said land and premises was never, at any time, located or claimed by the defendants herein or by either or any of said defendants for any mineral or minerals, other than mineral oil or petroleum and gas. Said defendants did not, nor did either or any of them, ever, at any time, enter into possession or occupy said land and premises, or any part thereof, or do, or perform, any exploration or work, with the intention or for the purpose in good faith of developing said land and premises, or any part thereof, for any mineral or minerals, other than mineral oil or petroleum or gas.

## VI.

On the 27th day of September, 1909, and at all times prior and up to the first day of March, 1910,



the said land and premises heretofore in paragraph II of this bill particularly described and the whole thereof, was in the full, free, open and exclusive possession of this plaintiff, and the defendants herein were not, nor was either, or any of them, on said 27th day of September, 1909, or at any time prior to the first day of March, 1910, an occupant or claimant of, or in the possession of, said land and premises, or any part thereof. Said defendants were not, nor was either or any of them nor any other person or persons, on the 27th day of September, 1909, or at any time, or at all, prior to the 6th day of March, 1910, in the diligent, or any prosecution of work upon said land and premises, or any part thereof, leading to the discovery of oil, petroleum or gas or any other mineral or mineral deposits in, upon or under said land, or any part thereof.

No work of exploration, for the purpose of discovery or [14] development of the oil, petroleum or gas, or any other mineral or minerals or deposits of the same, on or in or under said land or any part thereof, was ever, at any time, prior to the 6th day of March, 1910, commenced or prosecuted in good faith, or otherwise, or at all, by the said defendants, or either, or any of them, or by any other person or persons.

## VII.

On the 14th day of September, 1908, the Secretary of the Interior of the United States of America, by virtue of the power and authority reposed in him by law, duly and regularly withdrew a large body of land of the same general character as the land



hereinbefore in paragraph II of this bill particularly described, and including the said land and premises in paragraph II of this bill particularly described, from agricultural entry and reserved the same from settlement, entry, or purchase, under the agricultural land laws of the United States, for the purpose of examination and classification of said lands by the United States geological survey.

On the 4th day of June, 1909, the said land particularly described in paragraph II hereof, to wit: The northwest quarter of Section thirty-two, Township twelve north, Range twenty-three west, San Bernardino meridian, together with other lands in the vicinity thereof, all included in the said order of withdrawal of September 14th, 1908, aforesaid, was, in accordance with law, duly and regularly reported and classified as oil and petroleum bearing land by the United States geological survey. Said classification was duly and regularly approved by the Secretary of the Interior on the 9th day of June, 1909, and said lands last above described and in particular the said land particularly described in paragraph II of this bill, ever since said 9th day of June, 1909, have continued to be, and are [15] now, classified as, and held to be, mineral oil and petroleum lands. Said order of withdrawal of September 14, 1908, ever since said date has been and still is in full force and effect.

#### VIII.

On the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and by authority of law, and in

pursuance of the power legally invested in him so to do, did duly and regularly withdraw said land and premises described in paragraph II of this bill, and the whole thereof, from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States, and reserved the same for public purposes, and since said last mentioned date none of said land has been subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States.

On the second day of July, 1910, the President of the United States, under authority of law, and by virtue of the power and authority vested in him so to do, and especially in pursuance of the act of Congress approved June 25, 1910, entitled: "An Act to Authorize the President of the United States to Make Withdrawal of Public Lands in Certain Cases" (36 Stats. 847), did duly and regularly ratify, confirm and continue in full force and effect the said previous order of withdrawal and reservation under and by which said land and premises was withdrawn and reserved on said 27th day of September, 1909, as aforesaid, and did further withdraw and reserve said land and premises, and the whole thereof, from mineral exploration and from all forms of settlement, location, sale, entry or disposal under the mineral or nonmineral public land laws of the United States, subject only to the provisions, limitations, exceptions [16] and conditions contained in said act of Congress above mentioned. Said last-mentioned with-



drawal and reservation ever since said second day of July, 1910, has been, and now is, in full force and effect, and covers and includes said land and premises hereinbefore in paragraph II particularly described.

### IX.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and the lawful orders and proclamations of the President of the United States, the defendants herein, subsequent to the first day of March, 1910, entered upon said land and premises, and pretended to acquire mineral rights therein, and have committed and are now committing trespass and waste thereupon to the great and irreparable injury of this plaintiff, as is more fully hereinafter set forth.

### X.

On or about the 6th day of March, 1910, defendant Los Angeles-McKittrick Oil Company wilfully, wrongfully, without right and without the consent of and against the will of this plaintiff, and in violation of said order of withdrawal of date September 27, 1909, entered into the possession of said lands and premises in paragraph II of this bill particularly described for the purpose of prospecting and developing the same for mineral oil and petroleum, and extracting said mineral oil and petroleum therefrom, and commenced drilling operation upon said lands and premises or some part thereof. While said drilling operations were being conducted by defendant Los Angeles-McKittrick Oil Company, to wit, on or about



the 22d day of April, 1910, the defendant Midway Northern Oil Company, in violation of said order of withdrawal of September 27th, 1909, wrongfully, without right and without the consent of and against [17] the will of this plaintiff, under some agreement with said defendant Los Angeles-McKittrick Oil Company, entered into the possession of said lands and premises and took charge of said drilling operations, and the tools, machinery and appliances used in connection therewith, and continued the drilling operations theretofore commenced by defendant Los Angeles-McKittrick Oil Company, and said defendant Midway Northern Oil Company and its agents, servants and employees wrongfully and in violation of said orders of withdrawal of September 27th, 1909, and July 2, 1910, continued said drilling operations and drilled and constructed an oil well on said land, in which said well oil was discovered on, but not before, the 6th day of July, 1910. Said defendant Midway Northern Oil Company ever since said 6th day of July, 1910, has continued to and does now extract, take and appropriate to its own use, large quantities of valuable mineral oil and petroleum belonging to plaintiff from said land and premises by means of said well and other wells.

Plaintiff is informed and believes, and therefore states the fact to be, that defendants Los Angeles-McKittrick Oil Company and Midway Northern Oil Company entered into the possession of said land and premises, and commenced and continued drilling said wells and taking and extracting said mineral oil and petroleum therefrom, and appropriating the

same, as aforesaid, claiming the right so to do, under and by virtue of one or more of the following three pretended placer mining locations:

1.

That certain pretended placer mining location under and by which the whole of the land and premises in paragraph II of this bill particularly described was and is claimed (as appears by the notice of said pretended location, dated February 15, 1909, and filed for record in the office of the county recorder [18] of Kern County, California, on February 1st, 1910) to have been located on the 15th day of February, 1909, as the "Lone Star" placer mining claim, under the placer mining laws of the United States, by an association of eight persons, to wit: The defendants Arthur Whitfield, Maude Whitfield and James E. Stone, and five other persons, to wit: Lemuel Karns, Alice Gray, John P. McPhaul and C. C. Lary and H. H. McPhaul (said eight persons are hereinafter referred to as and called the "Lone Star" Locators).

2.

That certain pretended placer mining location under and by which the whole of said land and premises in paragraph II of this bill particularly described was and is claimed (as appears by the notice of said pretended location dated March 18, 1901, and filed for record in the office of the county recorder of Kern County, California, December 30, 1904) to have been located on the 18th day of March, 1901, as the "Hermosa" placer mining claim, under the placer mining laws of the United States, by an asso-



ciation of eight persons, to wit: Mrs. W. L. Hobbs, W. L. Allen, Maude Allen, Frankie Francis, George E. Francis, Louise Francis, Frank P. Francis and Albert Brown. (Said eight persons are hereinafter referred to as and called the "Hermosa" Locators.)

## 3.

That certain pretended placer mining location under and by which the whole of said land and premises in paragraph II of this bill particularly described was and is claimed (as appears from the notice of said pretended location dated July 7th, 1910, and filed for record in the office of the county recorder of Kern county, California, August 6, 1910) to have been located on the 7th day of July, 1910, as the "Hermosa" placer mining [19] claim, under the placer mining laws of the United States, by an association of eight persons, to wit, the four defendants, Edward Fox, Charles A. Son, David S. Bachman and Arthur Whitfield, and four other persons, to wit, Charles Dickinson, John Patterson, E. A. Whitten and B. M. Howe. (Said eight persons are hereinafter referred to as and called the Second "Hermosa" Locators.)

And under and by virtue of divers mesne pretended conveyances, leases, subleases and agreements from said "Lone Star" Locators, "Hermosa" Locators and Second "Hermosa" Locators, and their pretended successors in interest, to said defendants Los Angeles-McKittrick Oil Company and Midway Northern Oil Company.

## XI.

On or about the 11th day of March, 1910, defendant



Consolidated Midway Oil Cimpany willfully, wrongfully, without right and without the consent of and against the will of this plaintiff, and in violation of said order of withdrawal of date September 27, 1909, entered into the possession of said land and premises in paragraph II of this bill particularly described for the purpose of prospecting and developing the same for mineral oil and petolenm, and extracting said mineral, oil and petroleum therefrom, and commenced drilling operations upon said land and premises or some part thereof. Defendants Consolidated Midway Oil Company and National Pacific Oil Company and their agents, servants and employees, wrongfully and in violation of said orders of withdrawal of September 27, 1909, and July 2, 1910, continued said drilling operations and drilled and constructed an oil well on said land, in which said well oil was discovered on or about, and not before, the [20] 1st day of April, 1911. Said defendants Consolidated Midway Oil Company and National Pacific Oil Company, ever since said 1st day of April, 1911, have continued to, and do now, take, extract and appropriate to their own use, large quantities of valuable mineral oil and petroleum from said land and premises, by means of said well and other wells.

Plaintiff is informed and believes, and therefore states the fact to be, that defendants Consolidated Midway Oil Company and National Pacific Oil Company entered into the possession of said land and premises, and commenced and continued drilling said wells and taking and extracting said oil and petrol-

eum therefrom, and appropriating the same, as aforesaid, claiming the right so to do under and by virtue of one or more of the following two pretended placer mining locations, to wit:

## 1.

That certain pretended placer mining location under and by which the whole of said land and premises in paragraph II of this bill particularly described was and is claimed (as appears from the notice of said pretended location dated January 1st, 1909, and filed for record in the office of the county recorder of Kern county, California, February 2, 1910) to have been located on the 1st day of January, 1909, as the "Warrior No. 1," placer mining claim, under the placer mining laws of the United States by an association of eight persons, to wit: The five defendants, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn, and three other persons, to wit, Edward Haigh, Emma Haigh and W. F. O'Leary. (Said eight persons are hereinafter referred to as and called the "Warrior No. 1" Locators.)

## 2.

That certain pretended placer mining location under and by which the whole of said land and premises in paragraph II [21] of this bill particularly described was and is claimed (as appears from the notice of said pretended location dated June 29, 1910, and filed for record in the office of the county recorder of Kern county, California, July 22, 1910) to have been located on the 29th day of June, 1910, as the "Luck No. 2" placer mining claim, under the



placer mining laws of the United States, by an association of *eight* persons, to wit, the defendants, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette and R. P. Davie. (said *eight* persons are hereinafter referred to as and called the "Luck No. 2" Locators.)

And under and by virtue of divers mesne pretended conveyances, leases, subleases and agreements from said "Warrior No. 1" Locators and said "Luck No. 2" Locators, and their pretended successors in interest, to said defendants, Consolidated Midway Oil Company and National Pacific Oil Company.

## XII.

On or about the 31st day of October, 1910, defendant Maricopa Northern Oil Company wilfully, wrongfully, without right and without the consent of and against the will of this plaintiff, and in violation of said orders of withdrawal of September 27, 1909, and July 2, 1910, entered into the possession of said land and premises in paragraph II of this bill particularly described, for the purpose of prospecting and developing the same for mineral oil and petroleum, and extracting said mineral oil and petroleum therefrom and commenced drilling operations upon said land and premises in paragraph II of this bill particularly described, and continued said drilling operations and drilled and constructed an oil well on said land and premises in which said well oil was discovered on or about, and not before, the 1st day of June, 1911. Said defendant Maricopa [22] Northern Oil Company ever since said 1st day of June, 1911, has continued to, and does now, extract



and take and appropriate to its own use large quantities of valuable mineral oil and petroleum belonging to this plaintiff, from said land and premises, by means of said well and other wells.

Plaintiff is informed and believes, and therefore states the fact to be, that defendant Maricopa Northern Oil Company entered into the possession of said land and premises, and commenced and continued the drilling of said wells, and took and extracted and appropriated said mineral oil and petroleum therefrom, as aforesaid, claiming the right so to do under and by virtue of one or both of the following two pretended placer mining locations, to wit:

Those two certain pretended placer mining locations, to wit: the "Hermosa" placer mining claim, claimed to have been located on March 18, 1901, by the "Hermosa" Locators, and the "Hermosa" placer mining claim, claimed to have been located on July 7th, 1910, by the Second "Hermosa" Locators, as fully set forth in paragraph ~~XI~~ of this bill,

X

(Amended per minute order of January 27, 1913. C. E. Scott, Deputy Clerk.)

and under and by virtue of divers mesne pretended conveyances, leases, subleases and agreements from said "Hermosa" Locators and Second "Hermosa" Locators, and their pretended successors in interest, to said defendant Maricopa Northern Oil Company.

XIII.

On the 28th day of July, 1910, the defendants, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield and James E. Stone, together with one F. E.

Borton, claiming to be the then owners of the [23] said pretended "Lone Star" placer mining claim hereinbefore mentioned, embracing said land and premises in paragraph II of this bill described, and to have acquired all of the claimed rights and interests of said "Lone Star" Locators in and to said pretended mining claim, land and premises, and claiming, under and by virtue of the laws of the United States relating to placer mining claims to be entitled to a patent from plaintiff to the whole of said land and premises and claiming to have discovered, through and by their lessees and agents, mineral oil or petroleum in paying quantities in and upon said land, made and filed with the register and receiver of the United States land office at Los Angeles, California, their application, Serial No. 011,146, under the mining laws, for patent to said land and premises and the whole thereof, from this plaintiff. Said application for patent was based upon an alleged discovery of mineral oil or petroleum and of no other mineral, and the discovery relied upon in said application for patent was the discovery made upon said land and premises on the 6th day of July, 1910, as heretofore, in paragraph X of this bill, set forth and described, and no other. On said 28th day of July, 1910, said application for patent was duly and regularly rejected by said register and receiver of said Los Angeles land office and thereafter proceedings were had, in accordance with law, and the rules and regulations of the department of the interior and the general land office, in such cases made and provided, and the mat-



ter duly and regularly appealed to the Commissioner of the General Land Office by said applicants from the said decision of said register and receiver. The said Commissioner of the General Land Office, on the 4th day of April, 1911, duly and regularly gave, made and rendered [24] his decision, affirming the action of said register and receiver, and rejecting said application for patent. Thereafter, the said applicants in the manner and form required by law appealed from said decision of the Commissioner of the General Land Office, as aforesaid, to the Secretary of the Interior. Said appeal was duly and regularly in the mode and manner authorized by law and by the rules and regulations of the department of the interior and the general land office, presented and submitted to the said Secretary of the Interior, for his decision and judgment, and the said Secretary of the Interior, on 29th day of November, 1911, duly and regularly gave, made and rendered his decision and judgment, affirming the said action and decision of the Commissioner of the General Land Office, and rejected the said application for patent. Said decision and judgment of the Secretary of the Interior has become and is a final judgment and said application for patent has been and is finally rejected and disallowed.

On the 1st day of August, 1910, defendant, Julius Fried, claiming to be the then owner of said pretended "Warrior No. 1" placer mining claim hereinbefore mentioned, embracing the land and premises in paragraph II of this bill particularly described, and to have acquired all of the alleged rights



and interests of the said "Warrior No. 1" Locators, and claiming, under and by virtue of the laws of the United States relating to placer mining claims, to be entitled to a patent to the whole of said land and premises and claiming to have discovered mineral oil and petroleum in paying quantities in and upon said land, made and filed with the register and receiver of the United States Land Office at Los Angeles, California, his application, Serial No. 011,162, under the mining laws of the United States, for patent to said land and premises and the whole thereof, as an oil placer mining claim. Said application for patent was based upon an alleged discovery of mineral oil [25] or petroleum and of no other mineral. Thereafter, and after proceedings duly and regularly had and taken in the matter of said application, and in accordance with law and the rules and regulations of the department of the interior in such cases made and provided, said application was, on the 13th day of July, 1912, duly and regularly, finally rejected and disallowed by said department of the interior.

On the 17th day of August, 1910, defendants, Charles A. Son and David S. Bachman, claiming to be the then owners of the said pretended "Hermosa" placer mining claim, alleged to have been located July 7, 1910, by the said Second "Hermosa" Locators, as hereinbefore in paragraph X set forth, embracing the land and premises in paragraph II of this bill described, and to have acquired all of the alleged rights and interests of the said Second "Hermosa" Locators, and claiming under and by virtue

of the laws of the United States relating to placer mining claims, to be entitled to a patent to the whole of said land and premises, and to have discovered mineral oil and petroleum in paying quantities in and upon said land, made and filed with the register and receiver of the United States Land Office in Los Angeles, California, their application, Serial No. 011,246, under the mining laws of the United States for patent to said land and premises, and the whole thereof, as an oil placer mining claim. Said application for patent was based upon an alleged discovery of mineral oil or petroleum and of no other mineral. Thereafter, and after proceedings duly and regularly had and taken in the matter of said application, and in accordance with law and the rules and regulations of the department of the interior in such cases made and provided, said application was, on the 22d day of October, 1912, duly and regularly, finally rejected and disallowed by said department of the interior.

On the 28th day of October, 1911, defendant, Mary F. [26] Francis, claiming to be the then owner of said pretended "Hermosa" placer mining claim, hereinbefore mentioned, embracing the land and premises in paragraph II of this bill described, and to have acquired all of the alleged rights and interests of the "Hermosa" Locators, and claiming, under and by virtue of the laws of the United States relating to placer mining claims, to be entitled to patent to the whole of said land and premises, and to have discovered mineral oil and petroleum in paying quantities in and upon said land, made and filed with the register and receiver of the United States Land



Office at Los Angeles, California, her application, Serial No. 014,132, under the mining laws of the United States, for patent to said land and premises, and the whole thereof, as a placer mining claim. Said application for patent was based upon an alleged discovery of mineral oil or petroleum and of no other mineral. Thereafter, and after proceedings duly and regularly had and taken in the matter of said application, and in accordance with law and the rules and regulations of the department of the interior in such cases made and provided, said application was, on the 19th day of January, 1912, duly and regularly, finally rejected and disallowed by said department of the interior.

Each and all of the aforesaid applications for patent have been disallowed and finally rejected by the department of the interior of the United States and said department of the interior has heretofore, by virtue of the power and authority invested in it so to do, duly and regularly adjudged and decreed that each and all of the claims of the said applicants for patent were void in law and without right, on the ground and for the reason, among others, that said land and premises has been at all times from and after September 27th, 1909, lawfully withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral [27] public land laws of the United States and not subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States, and that neither of said applicants nor any other person was, on the 27th day of Septem-



ber, 1909, or at any time prior thereto, a *bona fide* occupant or claimant of said land or engaged in the diligent prosecution of work leading to discovery of or for the purpose of discovering oil or gas upon said land.

#### XIV.

Each and all of the claims of the defendants in this bill mentioned of any rights or interests in said land and premises, or any part thereof, as well as the claimed rights of each and all of said defendants to take and extract from said land and premises, or any part thereof, mineral oil, petroleum or gas, or any other mineral, and to appropriate the same, is and are based and claimed entirely upon an alleged compliance by some one or more of said defendants, and their predecessors in interest, respectively, with the laws of the United States relating to placer mining claims, and each and all of the defendants de-rain and claim their alleged interests and rights solely and exclusively from one or more of the five pretended placer mining locations hereinbefore set forth, and more particularly described in Paragraphs X, XI and XII of this bill.

Plaintiff further states that the records of the County of Kern, State of California, show that the claimed rights and interests of the locators of said five pretended placer mining claims, in and to said land and premises, have, since the dates of the respective notices of locations of said pretended claims, been conveyed to and are now claimed by the following named defendants, respectively, to wit: [28]

“LONE STAR,”

William Kimball,  
Arthur Whitfield,  
Maud Whitfield,  
Harry V. Massena,  
James Bloom,  
L. W. Lowell,  
James E. Stone.

“WARRIOR NO. 1,”

David S. Bachman,  
Charles A. Son,  
M. P. Waite,  
Anna M. Waite,  
Florence G. Weil,  
A. L. Weil,  
J. M. Danziger,  
Daisy C. Danziger.

“HERMOSA” (claimed to have been located March  
18, 1901),

Mary F. Francis.

“LUCK NO. 2,”

E. A. Wiltsee,  
G. G. GILLETTE,  
Sydney Smith,  
J. R. McKinnie,  
J. M. Danziger,  
Orra E. Monnette,  
M. J. Monnette,  
R. P. Davie,

“HERMOSA” (Claimed to have been located July 7,  
1910),

Charles A. Son and  
David S. Bachman,

subject to divers mesne purported leases, subleases, liens, and agreements.

The instruments recorded in said county of Kern purporting to affect said land and premises in paragraph II of this bill described, or some part thereof, are so numerous and conflicting that it is impossible for this plaintiff to ascertain therefrom the nature or extent of the interests claimed therein by either or any of the defendants herein, except as herein stated, hence a full discovery is sought herein.

Plaintiff further states that prior and up to the 1st day of May, 1911, the said pretended locators and claimants of each of [29] the aforesaid pretended placer mining claims, and the successors in interest of said locators, each, respectively, claimed the whole of said land and premises in paragraph II of this bill described, and the exclusive right to extract mineral oil, petroleum and gas therefrom, adverse to and in conflict with each of the other said pretended locations.

Plaintiff is informed and believes, and therefore states the fact to be that on or about said 1st day of May, 1911, an agreement purporting to settle said conflicting claims was made and entered into; that by the terms of said agreement, defendants Maricopa Northern Oil Company, National Pacific Oil Company, Midway Northern Oil Company and Consolidated Midway Oil Company, were given the full and complete possession of the whole of said land and premises hereinbefore in paragraph II particularly described, with the right to develop and extract the mineral oil, petroleum and gas therefrom; that de-



fendant Thirty Thirty-Two Land Company claims some right, title or interest in said land and premises under said alleged agreement.

Plaintiff is further informed and believes, and therefore states the fact to be, that said agreement purported to compromise and define the conflicting interests of each and all of the parties entering into the same, but as to the terms or conditions of said agreement, the parties thereto, or the respective parts of said land and premises allotted, and to whom, plaintiff has no knowledge or information, and for that reason a full discovery is sought herein. Said agreement was never recorded in the office of the county recorder of Kern County, but has at all times been kept secret.

#### XV.

Defendants Midway Northern Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company and Maricopa Northern Oil Company, are now in the actual possession of the [30] said land and premises heretofore in paragraph II of this bill particularly described. The precise parts or portions of said land and premises in the possession of and claimed by each of the respective defendants in this paragraph mentioned, is to plaintiff unknown. Each of said last-named defendants does now claim the right to the possession of a part or the whole of said land and premises, and the right to drill for and extract oil, petroleum and gas therefrom, and to convert the same to its own use. Plaintiff leaves said defendants to set forth in this suit their respective claims of interest.

Said last-named four defendants have, since said 6th day of July, 1910, wrongfully and without the consent of the plaintiff, and in violation of said orders of withdrawal hereinbefore mentioned, extracted and taken from said lands and premises, or some part or portion thereof, and sold or otherwise appropriated to its own use, large quantities of oil and petroleum. Plaintiff does not know the exact amount of or value of said oil or petroleum taken, extracted and sold or appropriated by said last named defendants, respectively, or in the aggregate, but is informed and believes and therefore states that, in the aggregate, it exceeds two hundred thousand barrels and is and was of the value of more than one hundred thousand dollars. Plaintiff cannot ascertain said facts except by an accounting and discovery, and therefore a full discovery in the premises is sought herein.

Each of said last-named four defendants is now extracting and appropriating to its own use, and threatens to and will, unless restrained by this Court, continue to extract and appropriate to its own use, large and increasing quantities of the said mineral oil and petroleum contained in and under said land or some part thereof, and threatens to and will, unless restrained by this Court, otherwise commit trespass and waste [31] upon said land and premises, or some part thereof, to the great and irreparable injury of this plaintiff.

#### XVI.

Plaintiff is informed and believes, and upon such information and belief states the fact to be that each



of the defendants, Los Angeles-McKittrick Oil Company, Mary F. Francis, L. W. Lowell, James Bloom, William S. Kimball, Arthur Whitfield, Maud Whitfield, James E. Stone, Harry V. Massena, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, M. P. Waite, Anna M. Waite, J. M. Danziger, Daisy C. Danziger, A. L. Weil, Florence G. Weil, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn, has heretofore, and since the 6th day of July, 1910, wrongfully and without the consent of this plaintiff, and in violation of said orders of withdrawal hereinbefore mentioned, extracted and taken from some part or portion of said land and premises and sold or otherwise appropriated to his, her or its own use, large quantities of valuable oil and petroleum. Plaintiff is not advised of and does not know the exact amount or value of said oil or petroleum taken, extracted or appropriated by said last-named defendants, or either of them, and cannot ascertain said facts except by an accounting and discovery herein, and therefore a full discovery in the premises from each and all of said defendants is hereby sought herein.

Each of said defendants in this paragraph named threatens to and will, unless restrained by this Court, continue to extract and appropriate, or cause to be extracted and appropriated to his, her or its own use, large quantities of the mineral [32] oil and petroleum contained in and under said land, or some part



thereof, and otherwise commit trespass and waste upon said land, or some part thereof, to the great and irreparable injury of this plaintiff.

#### XVII.

Large quantities of said oil and petroleum so wrongfully extracted and taken from said land and premises as aforesaid, have been sold or otherwise disposed of and delivered to the defendants, Standard Oil Company and Tarr & McComb, Inc., by the said defendants who, as aforesaid, have heretofore wrongfully extracted the same from said land and premises. Said defendants, Standard Oil Company and Tarr & McComb, Inc., have, with full knowledge of the premises, received large quantities of said oil and petroleum, so wrongfully taken and extracted from said lands as aforesaid, and have appropriated the same to their own use and to the use of each of them. Plaintiff is not informed of, and does not know, of the exact quantity or value of the oil and petroleum so received by and appropriated to the use of said defendants, Standard Oil Company, and Tarr & McComb, Inc., or either of them. Plaintiff is not advised of and does not know, from what defendant or defendants, Standard Oil Company and Tarr & McComb, Inc., receive said oil and petroleum nor can plaintiff ascertain said facts except by an accounting and discovery in this suit, and therefore a full and complete discovery in the premises as sought and demanded herein.

#### XVIII.

Plaintiff is informed and believes, and upon such information and belief states the fact to be that each

of the defendants in this bill named, other than the defendants Southern Investment Company, William R. Dunn, King Lumber Company, T. J. Green, Layne & Bowler Company of California, Sesame Oil Company, [33] Title Insurance & Trust Company, A. B. Coulson and Tarr & McComb, Inc., claims and asserts some right, title and interest in, or lien upon, said land and premises hereinbefore in paragraph II particularly described, or to some part thereof, and to the mineral oil, petroleum and gas therein contained, either as locator or as successor in interest of one or more of the locators of said pretended placer mining claims, hereinbefore described, by virtue of pretended deed, conveyance or assignment, or otherwise;

That each of the defendants, Southern Investment Company, William R. Dunn, King Lumber Company, T. J. Green, Layne & Bowler Company of California, and Sesame Oil Company, claim and assert some right, title and interest in or to, or lien upon, said land and premises hereinbefore in paragraph II particularly described, or some part thereof, as an attachment creditor or judgment creditor of one or more of the other defendants in this bill named;

That each of the defendants, Midway Northern Oil Company, Los Angeles-McKittrick Oil Company, Consolidated Midway Oil Company, General Petroleum Company, National Pacific Oil Company, Maricopa Northern Oil Company, and El Dora Oil Company, claims some right, title or interest in or to said land and premises hereinbefore in paragraph II particularly described, and in and to the mineral oil,



petroleum and gas therein contained, under and by virtue of one or more of said pretended placer mining locations hereinbefore set forth, and under and by virtue of certain pretended leases, assignments of leases, agreements to convey and conveyances, from the said alleged locators of said pretended placer mining locations, and the successors in interest of said locators, or otherwise; [34]

That defendants, Title Insurance & Trust Company, and A. B. Coulson, claim some right, title or interest in or to, or lien upon, said land and premises particularly described in paragraph II hereof, or some part thereof, under and by virtue of a pretended deed of trust in and by which said deed of trust defendant, Consolidated Midway Oil Company, as party of the first part, purports to convey to said defendant, Title Insurance & Trust Company, as trustee and party of the second part, certain claimed rights and interests in said land and premises as security for the payment of certain promissory notes payable to said defendant, A. B. Coulson, the said A. B. Coulson being the third party to said pretended trust deed. Said trust deed was recorded on the 9th day of March, 1911, in book 243 of trust deeds, page 51, records of Kern County.

Except as hereinbefore in this bill stated, plaintiff has no information of, and does not know the exact nature or extent of any of said claims asserted by the defendants herein, and therefore leaves said defendants to set forth and disclose their respective claims as they may be advised.

#### XIX.

Because of the premises of this bill, none of the



defendants herein have or ever had any right, title or interest in or to, or lien upon, the said land and premises hereinbefore in paragraph II of this bill particularly described, or in or to any part thereof, nor have said defendants, or either of them, any right or interest whatever in or to the mineral oil or petroleum or gas contained in or under said land or any part thereof, nor the right to take or extract oil or petroleum or gas from said land or any part thereof. Each of the claims of the defendants is without right and void as to this plaintiff, and should be so in equity decreed in favor of this plaintiff, and the said claims and each and all of them should be voided by a decree of this Court. [35]

XX.

Plaintiff has no plain, speedy or adequate remedy at law in the premises.

In consideration whereof, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That said defendants, and each of them, may be required to make full, true and direct answer respectfully to all and singular the matters and things hereinbefore stated and charged and to fully disclose and state their claims to said land and premises described in paragraph II of this bill, and to any and all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived;

2. That the said land and premises of the plaintiff, particularly described in paragraph II hereof, may be declared by this court to have been at all times from and after the 27th day of September, 1909, withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States;

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land and premises described in paragraph II of this bill, or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land or any part thereof; and that all and singular of said land and premises, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of [36] said defendants, and each and every one of them;

4. That each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land and premises, or any part thereof, or in or to any of the minerals or mineral deposits therein or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined



from going upon any part or portion of said land and premises, and from in any manner using any of said land and premises and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof;

5. That an accounting may be had by said defendants and each and every of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted or received by them or either or any of them, from said land and premises, or any part thereof, and of any and all moneys or other property or thing of value received from the sale or other disposition of any and all minerals extracted from said land and premises or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract or agreement concerning said land and premises, or any part thereof; and that the plaintiff [37] may recover from said defendants, respectively, all damages sustained by the plaintiff in the premises;

6. That a Receiver may be appointed by this Court to take possession of said land and premises, and of all wells, derricks, drills, pumps, storage vats, pipes, pipe lines, shops, houses, machinery, tools



and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extracting, storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land or any part thereof for the purpose of continuing, and with full power and authority to continue, the operations on said land in the production and sale of petroleum and other minerals, and for the preservation, protection and use of the wells, derricks, pumps, tanks, storage vats, pipes, pipe lines, houses, shops, tools, machinery and appliances being used by the defendants, their officers, agents, or assigns in the production, transportation, manufacture or sale of petroleum or other minerals from said land and premises or any part thereof, and that such Receiver may have the usual and general powers vested in receivers of courts of chancery;

7. That plaintiff may have such other and further relief as in equity may seem just and proper.

To the end therefore that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to the said defendants herein, to wit: Midway Northern Oil Company, Los Angeles-McKittrick Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Northern Oil Company, Thirty Thirty-two Land Company, [38]

General Petroleum Company, Standard Oil Company, Tarr & McComb, Inc., Layne & Bowler Company of California, Title Insurance & Trust Company, Maricopa Consolidated Oil Company, Southern Investment Company, El Dora Oil Company, King Lumber Company, Sesame Oil Company, Mary F. Francis, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M. Danziger, Daisy C. Danziger, A. L. Weil, Florence G. Weil, A. B. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there, severally, full, true, and direct answers make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by, such order, direction and decree as may be made against them or any of them in the premises and as shall be meet and agreeable to equity.

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,  
United States Attorney. [39]



United States of America,  
Southern District of California,  
County of Los Angeles,—ss.

Gratz W. Helm, being first duly sworn, deposes and says: I am now, and have been for more than four years last past an employee and agent of the General Land Office, Department of the Interior of the United States; at all times from and after the 1st day of July, 1910, I have been, and am now, Chief of Field Division of the General Land Office of the United States, assigned to duty in and in charge of the public lands of the said United States, comprised in the Sixth Field Division in the Southern District of California, including the land and premises described in paragraph 2 of the foregoing bill of complaint; during all of said times hereinbefore mentioned, under such employment, I have been engaged in field examinations and other investigations on behalf of the Department of the Interior, with reference to the administration of the public land laws of the United States and the enforcement and protection of the proprietary and other rights of the United States pertaining to said public lands; the acts and transactions referred to in the foregoing bill of complaint with reference to said land in paragraph II thereof described, were investigated by me, as such employee and agent, and under my supervision, direction and control, and in this manner I acquired *knowledge* thereof; I have read the foregoing bill of complaint and know the contents thereof; the same are true of my own knowledge,



except as to the statements therein made on information and belief, and as to those matters, I believe them to be true.

My knowledge of the facts upon which the prayer for temporary relief by injunction and receivership in said bill is based, was obtained from an inspection of the records of the United States Land Office for the Los Angeles Land District, [40] the records of the office of the County Recorder, county of Kern, California, and an inspection and observation of the land described in said bill of complaint, and operations conducted in and upon said land, and upon admissions and statements made by certain of the defendants and their duly authorized officers and agents.

GRATZ W. HELM.

Subscribed and sworn to before me this 23d day of January, 1913.

[Seal]

WM. M. VAN DYKE,  
Clerk U. S. District Court, So. Dist. California. [41]

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**[Motion to Dismiss Bill of Complaint.]**

*In the District Court of the United States, for the  
Southern District of California, Northern Division,  
Ninth Circuit.*

No. 47—CIVIL—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIDWAY NORTHERN OIL COMPANY, a Corporation,  
Los Angeles-McKittrick Oil Company,

a Corporation, Consolidated Midway Oil Company, a Corporation, National Pacific Oil Company, a Corporation, Maricopa Northern Oil Company, a Corporation, Thirty Thirty-two Land Company, a Corporation, General Petroleum Company, a Corporation, Standard Oil Company, a Corporation, Tarr & McComb, Inc., a Corporation, Layne & Bowler, Company of California, a Corporation, Title Insurance & Trust Company, a Corporation, Maricopa Consolidated Oil Company, a Corporation, Southern Investment Company, a Corporation, El Dora Oil Company, a Corporation, King Lumber Company, a Corporation, Sesame Oil Company, a Corporation, Mary F. Francis, a Widow, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M. Danziger, Daisy C. Danziger, A. L. Weil, Florence G. Weil, A. B. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn,

Defendants.

To the Honorable, the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit: [42]  
 Defendants, National Pacific Oil Company, a cor-



poration, Thirty Thirty-two Land Company, a corporation, General Petroleum Company, a corporation, Charles A. Son, David S. Bachman, J. M. Danziger, Daisy Danziger, A. L. Weil, and Florence G. Weil, by their Solicitor, A. L. Weil, Esq., hereby move that the Bill of Complaint in the above-entitled action, and the whole thereof, be dismissed for insufficiency of fact to constitute a valid cause of action in equity against the defendants in this:

That it appears from said Bill of Complaint that defendants entered on the land described therein prior to April 1st, 1910, and commenced drilling a well thereon for the purpose of discovering oil; that defendants, from said 1st day of April, 1910, were continuously in the diligent prosecution of work, in good faith, leading to the discovery of oil on said land, until the 6th day of July, 1910, when oil was discovered thereon in paying quantities; that defendants were in diligent prosecution of work in good faith leading to discovery of oil on the 2d day of July, 1910, claiming under mineral locations made prior to March 6th, 1910; that the basis of plaintiff's cause of action depends on an alleged withdrawal of the said lands described in plaintiff's Bill of Complaint on the 27th day of September, 1909, by the Honorable, the Secretary of Interior of the United States, and that said alleged withdrawal of said lands from entry on the 27th day of September, 1909, was unconstitutional, void and of no force and effect, and beyond the authority of the said Secretary of Interior, and contrary to the provisions of Chapter 6, of Title 32 of the Revised Statutes of the United



States, and the Act of Congress of February 11th, 1897, 29 Stat. L. 526, and the Acts amending and supplementing the same;

That is further appears that no withdrawal of the mineral [43] in said land was ever made.

A. L. WEIL,

Solicitor for Defendants National Pacific Oil Company, Thirty Thirty-two Land Company, Charles A. Son, David S. Bachman, J. M. Danziger, Daisy C. Danizger, A. L. Weil and Florence G. Weil.

[Endorsed]: No. 47—Civil—In Equity. U. S. District Court, Southern District of California, Northern Division, Ninth District. The United States of America, Plaintiff, vs. Midway Northern Oil Company, a Corporation, et al., Defendants. Motion to Dismiss. Filed Mar. 3, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. A. L. Weil, Solicitor for Certain Defendants, 1206 Alaska Commercial Building, San Francisco.

Recd. copy of the within Motion to Dismiss this 3d day of March, 1913.

A. I. McCORMICK,

U. S. Attorney. [44]

*In the District Court of the United States, for the  
Southern District of California, Northern Division,  
Ninth Circuit.*

No. 47—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

MIDWAY NORTHERN OIL COMPANY, a Corporation, Los Angeles-McKittrick Oil Company, a Corporation, Consolidated Midway Oil Company, a Corporation, National Pacific Oil Company, a Corporation, Maricopa Northern Oil Company, a Corporation, Thirty Thirty-two Land Company, a Corporation, General Petroleum Company, a Corporation, Standard Oil Company, a Corporation, Tarr & McComb, Inc. a Corporation, Layne & Bowler Company of California, a Corporation, Title Insurance & Trust Company, a Corporation, Maricopa Consolidated Oil Company, a Corporation, Southern Investment Company, a Corporation, El Dora Oil Company, a Corporation, King Lumber Company, a Corporation, Sesame Oil Company, a Corporation, Mary F. Francis, a Widow, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Messena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P.

Waite, Anna M. Waite, J. M. Danziger, A. L. Weil, Florence G. Weil, A. B. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn,  
Defendants.

**Order Allowing Motion to Rehear; Overruling Motions to Dismiss, and Appointing Receiver.**

WHEREAS, Motions to dismiss the bill of complaint in this suit were made by certain of the defendants herein, [45] and on January 3, 1914, at the United States District Court Room in Los Angeles the said motions were argued and submitted before the undersigned United States District Judge; and

WHEREAS, On the 29th day of May, 1914, an opinion was rendered by the undersigned United States Judge holding that said motions to  
M. T. D. dismiss should be granted; and, *and* ordering said bill dismissed and denying the application for the appointment of a Receiver, and

WHEREAS, On the 29th day of June, 1914, the complainant presented a petition to rehear and reverse the said opinion and ruling of the Court, and said petition was, by order of the Court, allowed to be filed, and it was directed that further proceedings in the suit be stayed until the petition to rehear was determined and disposed of; and

WHEREAS, Prior to the time the opinion of the undersigned Judge of the United States District Court was rendered holding that the said motions to



dismiss should be allowed, there were argued and submitted on the 21st day of March, 1914, motions for injunction and for the appointment of a Receiver for the land described in the bill of Complaint herein and the property thereon, and the proceeds of oil and gas extracted therefrom; which said

M. T. D. motions were for the reasons set forth in said opinion, denied;

IT IS NOW, Upon further consideration, and particularly upon consideration of the opinion of the United States Supreme Court rendered on the 23d day of February, 1915, in the case of United States v. Midwest Oil Company, CONSIDERED, ORDERED, and ADJUDGED that the said petition to rehear filed heherin be, and the same is [46]

order  
M. T. D. hereby allowed, and the said ~~opinion~~ of this Court holding that this suit should be dismissed aside

M. T. D. missed is hereby ~~reversed~~ and the motions of the defendants herein to dismiss are hereby overruled and denied, and each of the said defendants who made said motions to dismiss is allowed five days to file answer in addition to the time allowed by the New Equity Rules. It is also ordered that the order denying the motion for the appointment

M. T. D. of a Receiver be vacated and set aside, and

IT IS FURTHER ORDERED That A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the Consolidated Midway Oil Company, the National Pacific Oil Company, Charles A. Son, David S. Bachman, and A. L. Weil, to wit:

The Northwest Quarter of Section Thirty-two,  
Township Twelve North, Range Twenty-three  
West, San Bernardino Meridian,

and of the oil, gas, and all other property of  
or already extracted from said land and still in the possession of  
M. T. D. every kind, situated on said land, de-

fendants, and the defendants, and <sup>A</sup> each  
of them, their agents, attorneys and employees  
are enjoined from removing said oil, gas, or other  
property, or any part thereof from said land, or in  
any manner interfering with the order of this Court,  
and are enjoined from further producing oil from said  
land, except by permission and under the direction of  
the said Receiver.

Said Receiver is directed to receive, and the said  
defendants are directed to surrender to said Receiver  
all moneys in their hands or in the hands of any per-  
son or corporation for them which are the proceeds of  
the sale [47] of oil or gas produced from said  
lands hereinbefore described, and the said Receiver  
is directed to collect any notes, accounts, or other evi-  
dences of debt due or payable on account of oil and  
gas produced from said lands and sold by or for said  
defendants, or any of them.

The said Receiver is given power and directed to  
operate any oil or gas well or wells on said property,  
or to permit them to be operated by the respective  
defendants now in possession of or operating same, or  
who have heretofore operated on said lands; or to  
close said wells, if he deems it necessary or advisable  
to do so in order to conserve the oil and gas in said  
lands and prevent said property from being damaged  
or the oil and gas from being wasted.



The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept [48] by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hand as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by



the said bank or banks only upon checks signed by said Receiver and by said solicitors of record, or otherwise as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000)

Dollars, to be approved by this Court, shall  
within five days from

M. T. D. be given by the Receiver the filing of this

order; provided the solicitor<sup>A</sup> for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond.

The amount of compensation to be paid to the  
[49] Receiver in this suit is to be determined hereafter.

April 23,

This ~~March~~, 1915.

M. T. DOOLING,  
United States District Judge.

[Endorsed]: No. 47—Civ. U. S. District Court, Southern District of California, Northern Division. United States of America, vs. Midway Northern Oil Co. et al. Order Allowing Motion to Rehear, Overruling Motions to Dismiss and Apptg. Receiver Filed Apr. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [50]

*In the District Court of the United States, for the  
Southern District of California, Northern Division,  
Ninth Circuit.*

No. 47—IN EQUITY.

THE UNITED STATES OF AMERICA,  
Plaintiff,  
versus

MIDWAY NORTHERN OIL COMPANY, a Corporation, Los Angeles—McKittrick Oil Company, a Corporation, Consolidated Midway Oil Company, a Corporation, National Pacific Oil Company, a Corporation, Maricopa Northern Oil Company, a Corporation, Thirty Thirty-two Land Company, a Corporation, General Petroleum Company, a Corporation, Standard Oil Company, a Corporation, Tarr & McComb, Inc., a Corporation, Layne & Bowler, Company of California, a Corporation, Title Insurance & Trust Company, a Corporation, Maricopa Consolidated Oil Company, a Corporation, Southern Investment Company, a Corporation, El Dora Oil Company, a Corporation, King Lumber Company, a Corporation, Sesame Oil Company, a Corporation, Mary F. Francis, a Widow, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M.

Danziger, A. L. Weil, Florence G. Weil, A. B. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn,

Defendants.

**Petition for Order Allowing Appeal.**

National Pacific Oil Company, a corporation, defendant, [51] herein, conceiving itself aggrieved by the Order given and rendered on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the above-entitled action, doth hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that part of said order, a copy of which order is hereto annexed, which orders that:

“IT IS FURTHER ORDERED that A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the Consolidated Midway Oil Company, the National Pacific Oil Company, Charles A. Son, David S. Bachman, and A. L. Weil, to wit:

The Northwest Quarter of Section Thirty-two, Township Twelve North, Range Twenty-three West, San Bernardino Base and Meridian, and of the oil, gas, and all other property of every kind situated on said land, or already extracted from said land and still in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property, or any part thereof from said land, or in any manner interfering with



the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation for them which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver is directed to collect any notes, accounts, [52] or other evidences of debt due or payable on account of oil and gas produced from said lands and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of the wells drilled on said land, and particularly for the purpose of determining whether water is infiltrating the oil sands or reser-

voirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hands as Receiver, as he shall deem [53] necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver, and by the said solicitors of record, or otherwise as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars, to be approved by this Court, shall be given by the Receiver within five days from the filing of this order; provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond."



And defendant prays that this, its appeal, may be allowed; and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Dated 20th May, 1915.

A. L. WEIL,  
Solicitor for Defendant, National Pacific Oil Company.

[Endorsed]: No. 47—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus Midway Northern Oil Company, a Corporation et al., Defendants. Petition for Order Allowing Appeal. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant, National Pacific Oil Company, Alaska Commercial Bldg, San Francisco, California. [54]

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*In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.*

No. 47—IN EQUITY.

THE UNITED STATES OF AMERICA,  
Plaintiff,  
versus

MIDWAY NORTHERN OIL COMPANY, a Corporation, Los Angeles—McKittrick Oil Company, a Corporation, Consolidated Midway Oil Company, a Corporation, National Pacific



Oil Company, a Corporation, Maricopa Northern Oil Company, a Corporation, Thirty Thirty-two Land Company, a Corporation, General Petroleum Company, a Corporation, Standard Oil Company, a Corporation, Tarr & McComb, Inc., a Corporation, Layne & Bowler, Company of California, a Corporation, Title Insurance & Trust Company, a Corporation, Maricopa Consolidated Oil Company, a Corporation, Southern Investment Company, a Corporation, El Dora Oil Company, a Corporation, King Lumber Company, a Corporation, Sesame Oil Company, a Corporation, Mary F. Francis, a Widow, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox. Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M. Danziger, A L. Weil, Florence G. Weil, A. V. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn,

Defendants.

### **Assignment of Errors.**

National Pacific Oil Company, a corporation, defendant [55] and appellant herein, having appealed, or being about to appeal, from that certain Order made in the District Court of the United

States, for the Southern District of California, Northern Division, Ninth Circuit, on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in an action pending in said Court in which The United States of America was plaintiff and the said National Pacific Oil Company, a corporation, and others, were defendants, by which said order a Receiver was appointed to take charge of the property of defendants, and each of them, says, that in the records and proceedings in the said Court in the said action, there are manifest errors, and assigns the following as its assignment of errors upon the said appeal:

I.

That said District Court erred in making said order and appointing a Receiver;

II.

That said District Court, in making said order, erred in this, that said Court had not, nor had the Judge thereof, any jurisdiction to make the said order;

III.

That said District Court erred, in making said order, in this, that the said Court abused its discretion and permitted an abuse of discretion in making said order;

IV.

That said District Court erred, in making said order, in that the complaint of plaintiff in said action did not show facts justifying the appointment of a Receiver;



## V.

That said District Court erred, in making said order, in that the complaint of plaintiff in the said action fails to [56] state any facts entitling the plaintiff herein to any equitable relief whatsoever.

## VI.

That said District Court erred, in making said order, in authorizing and directing the Receiver to take possession of the property mentioned in said order.

## VII.

That said District Court erred, in making said order, in this, that defendant at that time and long prior thereto was in the actual and peaceable possession of said property, claiming and holding the same under and by virtue of the laws of the United States, and that in and by the allegations of plaintiff's complaint herein, it appears that the plaintiff was and is out of possession. That it does not appear of record herein that an ancillary suit for the appointment of a Receiver had ever been commenced or brought by plaintiff against defendant. That plaintiff had and has a plain, speedy and adequate remedy at law, and said District Court, sitting as a Court of Equity herein, was and is without authority or jurisdiction to make said order.

## VIII.

That the District Court erred in making the order of the 23d day of April, 1915, and entered on the 26th day of April, 1915, appointing a Receiver herein, in that said Court was wholly without power and jurisdiction to give and make said order for the reasons



that a final decree dismissing the bill of complaint herein was entered on the first day of June, 1914; that no motion for a rehearing, or to vacate or annul said final decree herein was entertained by said Court during the term of said Court in which said final decree was given and [57] made; that during said term of said Court no order was made, nor asked for from said Court continuing any motion for a rehearing herein, to the succeeding term of said Court; that neither during said term of said Court, nor at any time thereafter, was any notice of motion for rehearing or any other motion by plaintiff herein served upon or given to the defendants herein. That no appeal from said final decree has ever been taken by the plaintiff herein.

WHEREFORE, the defendant, National Pacific Oil Company, prays that said order appointing a Receiver herein may be directed to be expunged from the records of said District Court for want of jurisdiction in said court to give and make said order appointing a Receiver.

In order that the foregoing assignment of errors may be and appear of record, the appellant above named presents the same to this Court, and prays that such disposition may be made thereof as by the law and the statutes of the United States in such case is made and provided.

A. L. WEIL,

Solicitor for Defendant and Appellant, National Pacific Oil Company.

[Endorsed]: No. 47—In Equity. District Court of United States, Southern District of California,

Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus Midway Northern Oil Company, a corporation et al., Defendants. Assignment of Errors. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant, National Pacific Oil Company, Alaska Commercial Bldg., San Francisco, California. [58]

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*In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.*

No. 47—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

MIDWAY NORTHERN OIL COMPANY, a Corporation, Los Angeles—McKittrick Oil Company, a Corporation, Consolidated Midway Oil Company, a Corporation, National Pacific Oil Company, a Corporation, Maricopa Northern Oil Company, a Corporation, Thirty Thirty-two Land Company, a Corporation, General Petroleum Company, a Corporation, Standard Oil Company, a Corporation, Tarr & McComb, Inc., a Corporation, Layne & Bowler Company of California, a Corporation, Title Insurance & Trust Company, a Corporation, Maricopa Consolidated Oil Company, a Corporation, Southern Investment Company, a Corporation, El Dora Oil Com-



pany, a Corporation, King Lumber Company, a Corporation, Sesame Oil Company, a Corporation, Mary F. Francis, a Widow, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M. Danziger, A. L. Weil, Florence G. Weil, A. B. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinnie, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn,

Defendants.

### **Order Allowing Appeal and Fixing Bond.**

On motion of A. L. Weil, Esq., counsel for defendant, [59] National Pacific Oil Company, a corporation, and on filing the petition of said defendant for an order allowing an appeal, together with an assignment of errors, IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order given and made herein on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit, appointing a Receiver to take charge of the property of defendants, and each of them.

That the amount of the bond upon said appeal be and is hereby fixed at the sum of \$—— if the writ of



supersedeas is desired.

That upon the execution and approval of said bond by this Court, a writ of supersedeas issue under the seal of this court, directed to plaintiff herein, its agents and servants, and the Receiver appointed herein under said order, that they desist and refrain from, in any manner, interfering with the southeast quarter of said property, or in any manner enforcing or attempting to enforce said order of the 23d day of April, 1915, against National Pacific Oil Company, until said appeal be heard and determined, or the further order of this Court. If a M. T. D. supersedeas is desired appellants may apply therefor to the Court of Appeals.

Dated 21st of May, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: No. 47—In Equity. District Court of the United States, Southern District of California, Northern Division. The United States of America, Plaintiff, versus Midway Northern Oil Company, a corporation, et al., Defendants. Order Allowing Appeal and Fixing Bond. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant, National Pacific Oil Company, Alaska Commercial Bldg., San Francisco, California. [60]

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**[Bond on Appeal.]**

KNOW ALL MEN BY THESE PRESENTS,  
That we, National Pacific Oil Company as principal,

and G. J. Syminton and R. E. Maynard, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars, to be paid to the said The United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of May in the year of our Lord one thousand, nine hundred and fifteen.

WHEREAS, lately at a District Court of the United States for the Southern District of California, Northern Division, 9th Circuit, in a suit depending in said Court, between the United States of America, plaintiff, vs. Midway Northern Oil Company, a corporation, et al., in which an order overruling motion to dismiss, and appointing a Receiver was rendered against National Pacific Oil Company and the said National Pacific Oil Company having obtained from said Court an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said The United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, the condition of the above obligation is such, that if the said National Pacific Oil Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good,



then the above obligation to be void; else to remain in full force and virtue. [61]

NATIONAL PACIFIC OIL CO., (Seal)

E. B. KIDSON, (Seal)

Secy.

G. J. SYMINTON. (Seal)

R. E. MAYNARD. (Seal)

Acknowledged before me the day and year first above written.

[Seal]

BERTHA L. MARTIN,

Notary Public in and for the County of Los Angeles,  
State of California.

United States of America,

Northern District of California,—ss.

G. J. Syminton and R. E. Maynard being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and worth the sum of FIVE HUNDRED DOLLARS ~~Dollars~~, exclusive of property exempt from execution, and over and above all debts and liabilities.

G. J. SYMINTON,

R. E. MAYNARD.

Subscribed and sworn to before me, this 21st day of May, A. D. 1915.

[Seal]

BERTHA L. MARTIN,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. 47—In Equity. United States District Court for the Southern District of California, Northern Division, Ninth Circuit. The United States of America vs. Midway Northern Oil Com-



pany, a Corporation, et al. Bond on Appeal of National Pacific Oil Company. Form of Bond and sufficiency of Sureties Approved. M. T. Dooling, Judge. Filed, Jun. 1, 1915. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. [62]

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UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Northern Division.*

Clerk's Office.

No. 47—CIVIL.

THE UNITED STATES OF AMERICA

vs.

MIDWAY NORTHERN OIL COMPANY et al.

**Praeipie [for Transcript of Record on Appeal].**

To the Clerk of Said Court:

Sir: Please issue Transcript of record on appeal of defendant, National Pacific Oil Company, in the above-entitled action, containing the following papers therein, viz:

1. Bill of Complaint;
2. Motion of Said Defendant to Dismiss Bill of Complaint;
3. Order Granting Motion to Rehear, Overruling Motion to Dismiss and Appointing Receiver;
4. Petition for Order Allowing Appeal, Omitting Therefrom Copy of Order Overruling Motion to Dismiss, etc., Attached Thereto;
5. Assignment of Errors;

6. Order Allowing Appeal, and Fixing Bond; and
7. Bond on Appeal.

A. L. WEIL,

Solicitor for National Pacific Oil Co.

[Endorsed]: No. 47—Civ. U. S. District Court, Southern District of California, Northern Division. United States vs. Midway Northern Oil Co., et al. Praecipe for Transcript on Appeal of National Pacific Oil Co. Filed, Aug. 26, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [63]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record on Appeal.]**

*In the District Court of the United States, in and  
for the Southern District of California, North-  
ern Division.*

No. 47—CIVIL.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

MIDWAY NORTHERN OIL COMPANY, a Corporation, Los Angeles-McKittrick Oil Company, a Corporation, Consolidated Midway Oil Company, a Corporation, National Pacific Oil Company, a Corporation, Maricopa Northern Oil Company, a Corporation, Thirty Thirty-Two Land Company, a Corporation, General Petroleum Company, a Corporation, Standard Oil Company, a Corporation, Tarr & McComb, Inc., a Corporation, Layne & Bowler

Company of California, a Corporation, Title Insurance & Trust Company, a Corporation, Maricopa Consolidated Oil Company, a Corporation, Southern Investment Company, a Corporation, El Dora Oil Company, a Corporation, King Lumber Company, a Corporation, Sesame Oil Company, a Corporation, Mary F. Francis, a Widow, L. W. Lowell, James Bloom, William S. Kimball, Harry V. Massena, Arthur Whitfield, Maude Whitfield, James E. Stone, John V. Hoffman, M. E. Hoffman, Edward Fox, Charles A. Son, David S. Bachman, William R. Dunn, T. J. Green, M. P. Waite, Anna M. Waite, J. M. Danziger, Daisy C. Danziger, A. L. Weil, Florence G. Weil, A. B. Coulson, E. A. Wiltsee, G. G. Gillette, Sydney Smith, J. R. McKinne, Orra E. Monnette, M. J. Monnette, R. P. Davie, Julius Fried, Parker Barrett, Oma Barrett, J. M. Dunn and Lena Dunn,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing sixty-three [64] (63) typewritten pages, numbered from 1 to 63, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Motion to Dismiss Bill of Complaint, Order Allowing Rehearing, Overruling Motion to Dismiss, and Appointing Receiver, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Bond,



Bond on Appeal, and Praecipe for Transcript in the above and therein entitled Transcript, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the National Pacific Oil Company, defendant and appellant, by its attorney of record.

I do further certify that the cost of the foregoing record is \$36.65, the amount whereof has been paid me by the National Pacific Oil Company, the appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 8th day of September, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,  
Deputy Clerk.

[Ten Cent Internal Revenue stamp. Canceled 9/  
18/15. L. S. C.] [65]

[Endorsed]: No. 2658. United States Circuit Court of Appeals for the Ninth Circuit. National Pacific Oil Company, a Corporation, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed September 21, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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**[Order Allowing Appellant to and Including August  
19, 1915, to File Transcript on Appeal.]**

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

No. 47—CIVIL—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

MIDWAY NORTHERN OIL COMPANY, et al.,

Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant National Pacific Oil Company have sixty (60) days additional and further time from the 20th day of June, 1915, within which to file its transcript on ap-

peal in the above-entitled suit with the Clerk of the United States Circuit Court of Appeals on and for the Ninth Circuit.

Dated June 16, 1915.

M. T. DOOLING,  
Judge of the District Court.

[Endorsed]: No. 47—Civil—In equity. U. S. District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff and Respondent vs. Midway Northern Oil Company et al., Defendants and Respondents. Order Extending Time to File Transcript on Appeal. Filed Jun. 17, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

No. 2658. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 19, 1915. File Record Thereof and to Docket Case. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 21, 1915. F. D. Monckton, Clerk.



**[Order Allowing Appellant to and Including October 18, 1915, to File Transcript on Appeal.]**

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

No. 47—CIVIL—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

MIDWAY NORTHERN OIL COMPANY, et al.,

Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant National Pacific Oil Company have sixty (60) days further time in addition to the time heretofore allowed within which to file its transcript on appeal in the above-entitled suit with the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated, August 16, 1915.

ROSS,  
Circuit Judge.

[Endorsed]: No. 2658. United States Circuit Court of Appeals for the Ninth Circuit. United States of America vs. Midway Northern Oil Company et al. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monekton, Clerk. Refiled Sep. 21, 1915. F. D. Monekton, Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MIDLAND OILFIELDS COMPANY, LIMITED,  
a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Northern Division.

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Filed

NOV 1 - 1915

F. D. Monckton,

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No. 2659

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MIDLAND OILFIELDS COMPANY, LIMITED,  
a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
Southern District of California, Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

For Appellant:

A. L. WEIL, Esq., 1206 Alaska Commercial Building, San Francisco, California.

For Appellees:

THOMAS W. GREGORY, Esq., Attorney-General of the United States, Washington, D. C.;

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California; and

E. J. JUSTICE, Esq., Special Assistant to the Attorney-General, Postoffice Building, San Francisco, California. [3\*]

**[Citation on Appeal (Original).]**

UNITED STATES OF AMERICA,—ss.

The President of the United States, To the United States of America, Greeting:

You are hereby cited and admonished to to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the United States District Court for the Southern District of California, Northern Division, Ninth Circuit, wherein the Midland Oilfields Company, Limited, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned should not be corrected, and

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\*Page-number appearing at foot of page of certified Transcript of Record.



why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 21st day of May, A. D. 1915.

M. T. DOOLING,

United States District Judge. [4]

[Endorsed]: No. A-3—In Equity. United States District Court for the Southern District of California, Northern Division, Ninth Circuit. Midland Oilfields Company, Limited, Appellant, vs. The United States of America. Citation on Appeal. Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Service accepted this 26 day of May, 1915.

E. J. JUSTICE.

P.

United States of America,—ss.

On this 26th day of May, in the year of our Lord one thousand nine hundred and fifteen, personally appeared before me, Flora Hall, Notary Public in and for the City and County of San Francisco, the subscriber, Charles M. Weile, and makes oath that he delivered a true copy of the within citation to United States of America, delivered to E. J. Justice, Solicitor for the within named plaintiff.

CHARLES M. WEILE.

Subscribed and sworn to before me at San Francisco, Cal., this 26th day of May, A. D. 1915.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

*In the District Court of the United States, in and  
for the Southern District of California, North-  
ern Division.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIM-  
ITED, Midlands Oilfields Company, Limited,  
El Dora Oil Company, National Pacific Oil  
Company, Miocene Oil Company, Consoli-  
dated Midway Oil Company, Californian  
Amalgamated Oil Company, Pan American  
Oil Company, Maricopa Consolidated Oil  
Company, General Petroleum Company, In-  
dependent Oil Producers Agency, Phoenix  
Refining and Manufacturing Company,  
Standard Oil Company, Title Insurance and  
Trust Company, King Lumber Company,  
Layne and Bowler Company of California,  
Sesame Oil Company, Thirty Thirty-Two  
Land Company, J. L. Campbell, H. M. Jack-  
son, John Shrader, A. B. Coulson, M. S.  
Platz, J. M. Dunn, C. S. Green, T. J. Green,  
H. H. Hair, Archibald York, David S. Bach-  
man, James Bloom, Daisy C. Danziger, J. M.  
Danziger, Edward Fox, Mary F. Francis,  
George C. Haldeman, John V. Hoffman, M. E.  
Hoffman, Benjamin M. Howe, Wilbert Mor-  
grage, Mrs. W. Morgrage, Robert F. O'Brien,

*National Pacific Oil Company vs.*

George L. Reynolds, Mrs. George L. Reynolds,  
Charles A. Son, Anna W. Mary Waite, M. P.  
Waite, D. C. Wallace, Jr., A. L. Weil and  
Florence G. Weil,

Defendants. [5]

No. A-3—IN EQUITY.

*In the District Court of the United States, Southern  
District of California, Northern Division,  
Ninth Circuit.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIM-  
ited, et al.,

Defendants.

**Bill of Complaint.**

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,  
United States Attorney.

B. D. TOWNSEND,  
Special Assistant to the Attorney General.

Filed Feb. 27, 1913. Wm. M. Van Dyke, Clerk.  
By Chas. N. Williams, Deputy Clerk. [6]



No. A-3—IN EQUITY.

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

THE UNITED STATES OF AMERICA,  
Plaintiff,  
versus

AMERICAN OILFIELDS COMPANY, LIM-  
ITED, Midlands Oilfields Company, Limited,  
El Dora Oil Company, National Pacific Oil  
Company, Miocene Oil Company, Consoli-  
dated Midway Oil Company, Californian  
Amalgamated Oil Company, Pan American  
Oil Company, Maricopa Consolidated Oil  
Company, General Petroleum Company, In-  
dependent Oil Producers Agency, Phoenix  
Refining and Manufacturing Company,  
Standard Oil Company, Title Insurance and  
Trust Company, King Lumber Company,  
Layne and Bowler Company of California,  
Sesame Oil Company, Thirty Thirty-Two  
Land Company, J. L. Campbell, H. M. Jack-  
son, John Shrader, A. B. Coulson, M. S.  
Platz, J. M. Dunn, C. S. Green, T. J. Green,  
H. H. Hair, Archibald York, David S. Bach-  
man, James Bloom, Daisy C. Danziger, J. M.  
Danziger, Edward Fox, Mary F. Francis,  
George C. Haldeman, John V. Hoffman, M. E.  
Hoffman, Benjamin M. Howe, Wilbert Mor-  
grage, Mrs. W. Morgrage, Robert F. O'Brien,  
George L. Reynolds, Mrs. George L. Reynolds,

Charles A. Son, Anna W. Mary Waite, M. P.  
Waite, D. C. Wallace, Jr., A. L. Weil and  
Florence G. Weil,

Defendants. [7]

To the Judges of the District Court of the United  
States for the Southern District of California,  
sitting within and for the Northern Division  
of said District:

The United States of America, by George W.  
Wickersham, its Attorney General, presents this, its  
Bill in Equity, against American Oilfields Company,  
Limited, Midland Oilfields Company, Limited, El  
Dora Oil Company, National Pacific Oil Company,  
Miocene Oil Company, Consolidated Midway Oil  
Company, Californian Amalgamated Oil Company,  
Pan American Oil Company, Maricopa Consolidated  
Oil Company, General Petroleum Company, Independent  
Oil Producers Agency, Phoenix Refining  
and Manufacturing Company, Standard Oil Company,  
Title Insurance and Trust Company, King  
Lumber Company, Layne and Bowler Company of  
California, Sesame Oil Company, Thirty Thirty-Two  
Land Company, J. L. Campbell, H. M. Jackson,  
John Shrader, A. B. Coulson, M. S. Platz, J. M.  
Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald  
York, David S Bachman, James Bloom, Daisy  
C. Danziger, J. M. Danziger, Edward Fox, Mary F.  
Francis, George C. Haldeman, John V. Hoffman, M.  
E. Hoffman, Benjamin M. Howe, Wilbert Morgrage,  
Mrs. W. Morgrage, Robert F. O'Brien, George L.  
Reynolds, Mrs. George L. Reynolds, Charles A. Son,  
Anna W. Mary Waite, M. P. Waite, D. C. Wallace,



Jr., A. L. Weil and Florence G. Weil, (citizens and residents, respectively, as stated in the next succeeding paragraph of this bill), and in that behalf the plaintiff complains and alleges:

I.

Each of the defendants American Oilfields Company, Limited, National Pacific Oil Company, Miocene Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company and [8] Thirty Thirty-Two Land Company, now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the State of California, and is a resident and citizen of said State. Each of the defendants El Dora Oil Company, Consolidated Midway Oil Company, Pan American Oil Company and Maricopa Consolidated Oil Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the former territory, now State, of Arizona, and is a resident and citizen of said State.

The defendant Midland Oilfields Company, Limited, now is, and at all the times herein mentioned as to it was, a corporation organized under the laws of the State of Delaware, and is a resident and citizen of said State.

The defendant Californian Amalgamated Oil Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized



under the laws of Great Britain, and is a resident and citizen of Great Britain.

The defendants J. L. Campbell, H. M. Jackson and John Shrader now are, and at all the times hereinafter mentioned as to them were, copartners doing business under the firm name of "Ohio Valley Construction Company," their principal place of business being located at Chester, State of West Virginia; and each of said last-named defendants is a resident and citizen of said State of West Virginia.

Except as hereinbefore stated each of the defendants herein is a resident and citizen of the State of California.

The defendant Mary F. Francis now is, and at all the times since January 16, 1909, has been, a widow. The defendant J. M. Danziger is the husband of the defendant Daisy C. Danziger. The defendant Wilbert Morgrage is the husband of the defendant Mrs. W. Morgrage. The defendant George L. Reynolds is the husband of the defendant Mrs. George L. Reynolds. The defendant M. P. Waite is the husband of the defendant Anna W. Mary Waite. The defendant A. L. Weil is the husband of the defendant Florence G. [9] Weil. The defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman are sued in their own right, respectively, and also as trustees under a certain purported trust deed hereinafter mentioned.

The defendant Title Insurance and Trust Company is sued in its own right, and also as trustee,

under a certain purported mortgage deed herein-after mentioned.

The defendant M. S. Platz is sued in his own right, and also as trustee under a certain purported trust deed hereinafter mentioned.

Certain of the defendants are described herein otherwise than by Christian name, for the reason that the Christian name of each of said defendants is unknown to plaintiff.

## II.

The plaintiff now is, and ever since the Treaty of Guadalupe Hidalgo has been, the owner and entitled to the immediate and exclusive possession and enjoyment of all the land next hereinafter described, and of all mineral oil, petroleum, gas and other minerals therein contained, said land being particularly described as follows, to wit: All the southeast quarter of section thirty-two, township twelve north, range twenty-three west, San Bernardino base and meridian, situated in Kern County, State of California. All of said land at all said times has been, and now is, a part of the public domain of the United States, except as withdrawn and reserved from entry as hereinafter alleged. All of said land now is, and at all times has been, oil-bearing land, containing rich deposits of petroleum or mineral oil and gas in commercially paying quantities, and at all times has been, and now is, chiefly valuable for the petroleum or mineral oil and gas deposited therein, and has never contained any minerals other than petroleum or mineral oil and gas. [10]



## III.

On September 14, 1908, the Secretary of the Interior of the United States of America duly and regularly withdrew and reserved the land hereinbefore described (together with other contiguous public lands) from settlement, entry or purchase under the agricultural land laws of the United States for the purpose of examining and classifying said lands.

On June 9, 1909, the land hereinbefore described (together with other contiguous public lands) was duly and regularly classified by the Secretary of the Interior as petroleum—or oil-bearing lands, which said order of classification ever since said last-named date has been, and still is, in full force and effect.

On September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other contiguous public lands) from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States; and since said last-named date none of said land has been subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States.

On July 2, 1910, the President of the United States, under the authority legally invested in him so to do, and especially by virtue of the provisions of the act of Congress approved June 25, 1910, entitled



“An Act to Authorize the President of the United States to Make Withdrawal of Public Lands in Certain Cases” (36 Stat. 847), duly and regularly ratified, affirmed and continued in full force and effect said order of withdrawal and reservation of September 27, 1909, and did further withdraw and reserve all [11] said land from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States, subject only to the provisions of said Act of Congress. Each of said orders of withdrawal and reservation, ever since the dates thereof, respectively, has been, and now is, in full force and effect.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and the lawful orders and proclamations of the President of the United States, the defendants herein, subsequent to January 1, 1910, entered upon the land hereinbefore particularly described, pretended to acquire, and now assert, mineral rights therein, or some part thereof, and have committed and are now committing trespass and waste thereupon, as more particulary hereinafter set forth.

#### IV.

On July 4, 1910, the defendant Consolidated Midway Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon the land hereinbefore described, and thereafter drilled and caused to be drilled an oil well thereupon, and thereafter oper-

ated sail oil well, and extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

During the month of December, 1910, said defendant Consolidated Midway Oil Company surrendered possession of said oil well to the defendant National Pacific Oil Company, and ever since said last named date the defendant National Pacific Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, has operated and still is operating said oil well, and has drilled and caused to be drilled other oil wells upon said land, and has operated [12] and still is operating said last-named oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 4, 1910, each of the defendants American Oilfields Company, Limited, Midland Oilfields Company, Limited, El Dora Oil Company and Miocene Oil Company, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and thereafter has operated and still is operating said oil well or oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 5, 1910, each of the defendants Californian Amalgamated Oil Company, Pan American Oil Company and Maricopa Consolidated Oil Company, wrongfully and unlawfully and in violation of the proprietary and other rights of this plain-



tiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and is still engaged in drilling an oil well or oil wells upon said land for the purpose of extracting from said land and appropriating to their use, respectively, the petroleum or mineral oil and gas deposited in said land. The plaintiff does not know whether said three last mentioned defendants, or either of them, have heretofore extracted from said land any petroleum or mineral oil or gas, and has no means of ascertaining the true facts in the premises, except from said defendants; therefore, a full discovery in the premises is sought herein.

The nine defendants last hereinbefore mentioned are hereinafter described collectively as "operators." [13]

Said operators entered upon said land, drilled oil wells thereupon, and extracted and are extracting petroleum or mineral oil and gas therefrom as aforesaid, claiming the right so to do under and by virtue of one or more of five certain pretended notices of mining location, to wit:

(1) That certain pretended notice of mining location purporting to have been signed by John Conley, Josephine Conley, A. E. Brown, James Hawley, Lilliam Hawley, Ira P. Goodwin and Leslie Francis, bearing date January 1, 1907, and recorded January 4, 1907, in book 42 of mining records, at page 121, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Elaine" Placer Mining Claim;



(2) That certain pretended notice of mining location purporting to have been signed by Julius Fried, Parker Barrett, J. M. Dunn, Lena Dunn, Edward Haigh, Emma Haigh, Oma Barrett and W. F. O'Leary (bearing no date), recorded February 3, 1910, in book 80 of mining records, at page 367, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Warrier No. 3" Placer Mining Claim;

(3) That certain pretended notice of mining location purporting to have been signed by Wilbert Morgrage, George L. Reynolds, D. C. Wallace, Jr., Robert F. O'Brien, Mrs. W. Morgrage, J. M. Danziger, Mrs. George L. Reynolds and Daisy C. Danziger (bearing no date), recorded July 19, 1910, in book 86 of mining records, at page 380, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Daisy No. 4" Placer Mining Claim;

(4) That certain pretended notice of mining location purporting to have been signed by T. A. O'Donnell, J. C. Anderson, E. L. Doheny, C. A. Canfield, J. M. Danziger, Norman Bridge, L. McCray and J. E. O'Donnell (bearing no date), recorded October 7, 1910, in book 88 of mining records, at page 149, in the office of the [14] county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "New Era No. 2" Placer Mining Claim;

(5) That certain pretended notice of mining lo-

cation purporting to have been signed by E. A. Wiltsee, O. E. Monnette, M. J. Monnette, R. P. Davie, J. R. McKinnie, G. G. Gillette, A. E. Perris and Lytle Hull (bearing no date), recorded October 18, 1910, in book 88 of mining records, at page 168, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Standard No. 1" Placer Mining Claim.

By each of said pretended notices of mining location an interest in all of said land and the right to extract minerals therefrom were asserted under the placer mining laws of the United States, and said operators claim under one or more of said pretended notices of mining locations by right of succession from said original pretended locators, or some of them, by virtue of some pretended conveyances, leases or assignments, and not otherwise. The plaintiff does not know definitely under which of said pretended notices of mining location said operators claim, respectively, and, therefore, leaves said defendants to set forth their respective claims of interest.

## V.

No work of exploration or development for the discovery of petroleum, mineral oil or gas, or any other mineral, was ever commenced or prosecuted, in good faith or otherwise, or at all, upon any part of said land under either or any of said placer mining claims hereinbefore described, or otherwise, by or on behalf of said pretended locators, or either or any of them, or any of their alleged successors in in-



terest, or any of the defendants herein, or otherwise, or at all, prior to July 4, 1910.

No discovery of any mineral (other than petroleum or mineral oil and gas) has ever been made in or upon any part of said land. Neither petroleum, mineral oil nor gas was ever discovered [15] in or upon any part of said land prior to October 10, 1910; and because of the premises of this bill, no valid discovery of petroleum, mineral oil and gas (within the meaning of the mineral land laws of the United States) was ever made in or upon any part of said land.

No valid location or entry of or claim to said land, or any part thereof, under any public land law of the United States, or otherwise, was ever made or acquired by said pretended locators, or either or any of them, or by any of their alleged successors in interest, or by the defendants herein, or either or any of them, or by any person or persons, corporation or corporations, or at all.

Except as set forth in this bill, no claim of any right, title or interest in or to, or lien upon, any of said land, or to the use or possession thereof, or to any of the minerals therein contained, is asserted by or on behalf of any person or persons, corporation or corporations, or at all

Each and all of the claims asserted by the defendants herein, and each of them, in or to said land, or any part thereof, or the use or possession thereof, or the minerals deposited therein, are based solely upon the pretended placer mining locations hereinbefore described.



Prior to January 1, 1910, no person or association or corporation was a *bona fide* occupant or claimant of any part of said land, engaged in the diligent or other prosecution or work leading to the discovery of oil or gas, or any other mineral.

VI.

The plaintiff does not know the exact quantity of petroleum, mineral oil or gas extracted from said land and appropriated by the defendants hereinbefore described as "operators," or any of them as aforesaid, and has no means of ascertaining the true [16] facts in the premises except from the defendants; and, therefore, a full discovery in the premises is sought herein.

Plaintiff is informed and believes, and therefore alleges, that a large part, if not all, of the petroleum or mineral oil and gas extracted from said land and appropriated by said "operators" as aforesaid, was by said "operators," respectively, sold to the defendants Standard Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, J. L. Campbell, H. M. Jackson and John Shrader, and was by said last named defendants, respectively, appropriated to their own use and benefit. The plaintiff does not know the exact quantity of petroleum or mineral oil and gas sold to and appropriated by said last named defendants, respectively, or either of them, or the price paid therefor, or the profits realized therefrom, and has no means of ascertaining the true facts in the premises except from the defendants herein; therefore, a full discovery in

the premises is sought herein.

The plaintiff does not know the exact quantity of petroleum or mineral oil and gas, if any, sold by said "operators," or any of them, to parties other than as stated above, or the name or names of said purchaser or purchasers, if any, or the price received therefor. or the price realized therefrom, and has no means of ascertaining the true facts in the premises, except from the defendants herein; therefore, a full discovery in the premises is sought herein.

#### VII.

Each of the defendants hereinbefore described as "operators" now continue and threaten, and unless restrained therefrom will continue, to operate the aforesaid oil wells and extract from said land petroleum or mineral oil and gas in large quantities, and to drill other oil wells upon said land and operate the same and extract from said land petroleum or mineral oil and gas, and otherwise commit trespass and waste upon said land, to the great irreparable injury of this plaintiff. [17]

#### VIII.

Each of the defendants David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Thirty Thirty-Two Land Company, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, and Florence G. Weil claims some right, title or interest in said land and the right



to extract minerals therefrom under one or more of said pretended notices of mining location, either as original locators thereof, or by virtue of some pretended conveyances, leases or assignments from certain of said pretended locators. The plaintiff does not know definitely the nature or the alleged basis of said claims of interest, and, therefore, leaves said defendants to set forth herein their respective claims of interest.

Each of said defendants last herein named, either directly or through some agent or attorney, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, heretofore entered into possession of some part of said land, and now continues and threatens, and unless restrained therefrom will continue, to hold possession thereof, and further threatens to, and unless restrained therefrom will, drill oil wells thereupon and extract petroleum or mineral oil and gas therefrom, and otherwise commit trespass and waste thereupon, to the great and irreparable injury of this plaintiff.

## IX

The defendant Title Insurance and Trust Company, claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain instrument in writing dated March 7, 1911, purporting to have been executed by the defendant Consolidated Midway Oil Company, wherein and whereby the [18] defendant Consolidated Midway Oil Company purported to mortgage to said Title Insurance and Trust Company certain of the aforesaid land (together with other land) to secure the payment of a certain indebted-



ness purported to be owing by said defendant Consolidated Midway Oil Company to the defendant A. B. Coulson, and the defendant A. B. Coulson claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of the instrument last herein described.

The defendant M. S. Platz claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain instrument in writing bearing date February 16, 1912, purporting to have been executed by the defendant El Dora Oil Company, wherein and whereby the defendant El Dora Oil Company purported to mortgage to the defendant M. S. Platz certain of said land to secure the payment of a certain indebtedness purported to be owing by the defendant El Dora Oil Company to the defendant John Shrader; and the defendant John Shrader claims some right, title or interest in or to, or lien upon, said land, or upon some part thereof, by virtue of the instrument last herein described.

The defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman claim some right, title or interest in or to said land, or some part thereof, or lien thereupon, individually, and also as trustee for the defendant Thirty Thirty-Two Land Company under some pretended conveyance or deed of trust, the particulars whereof are unknown to plaintiff; and the defendant Thirty Thirty-Two Land Company claims some right, title or interest in or to said land, or some part thereof, or lien thereupon, by virtue of said pretended conveyance or deed of trust.

The defendant General Petroleum Company claims some right, title or interest in or to said land, or lien thereupon, under some pretended conveyance, assignment or other instrument purporting [19] to have been executed by the defendant Thirty Thirty-Two Land Company or by some of the other defendants named herein, the particulars whereof are unknown to plaintiff

X.

The defendant J. M. Dunn claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded November 17, 1910, in book 4 of attachments, at page 402, in the records of Kern county, California.

The defendant C. S. Green claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded November 22, 1911, in book 5 of attachments, at page 132, in the records of Kern county, California.

The defendant T. J. Green claims some right, title or interest in or to, or lien upon said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded February 28, 1912, in book 5 of attachments, at page 227, in the records of Kern county, California

The defendant H. H. Hair claims some right, title or interest in or to, or lien upon said land, or some



part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded January 3, 1912, in book 5 of attachments, at page 174, in the records of Kern county, California.

The defendant King Lumber Company claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded February 16, 1912, in book 5 of attachments, at page 217, in the records of Kern county, California.

The defendant Layne and Bowler Company of California claims some right, title or interest in or to, or lien upon, said land, [20] or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded June 19, 1912, in book 5 of attachments, at page 291, in the records of Kern county, California.

The defendant Sesame Oil Company claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded May 5, 1911, in book 4 of attachments, at page 489, in the records of Kern county, California.

The defendant Archibald York claims some right, title or interest in or to said land, or some part thereof, by virtue of a certain sheriff's certificate of the sale of said land, or some part thereof, recorded October 11, 1911, in book 3 of certificates of sale, at page 214, in the records of Kern county, California.



## XI.

Except as in this bill stated, plaintiff has no knowledge or information concerning the exact nature or alleged basis of any of the claims asserted by the defendants herein, or any of them; and, therefore, leaves said defendants to set forth their respective claims of interest.

In that behalf plaintiff alleges that, because of the premises of this bill, none of the defendants have or ever had any right, title or interest in or to, or lien upon, said land, or any part thereof, or any right or interest in or to the petroleum or mineral oil or gas deposited therein, or any right to extract petroleum or mineral oil or gas, or any other mineral from said land, or any part thereof. On the contrary, each of said pretended placer mining locations is, and at all times has been, void and of no effect; and no rights whatever were ever acquired thereunder; and each and all of the aforesaid acts of the defendants herein in asserting an interest in or to said land, and in entering upon and taking and holding possession thereof, and in drilling and constructing oil wells thereupon, and in extracting, using and appropriating the petroleum or mineral oil and gas deposited [21] therein, were and are in violation of the laws of the United States and the aforesaid orders withdrawing and reserving said land, and all of said acts were and are in violation of the proprietary and other rights of this plaintiff.

## XII.

The present value of the land hereinbefore described exceeds one million (1,000,000) dollars.

In consideration whereof, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That said defendant, and each of them, may be required to make full, true and direct answer, respectively, to all and singular the matters and things hereinbefore stated and charged and to fully disclose and state their claims to said land hereinbefore described, and to any and to all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived;

2. That the said land may be declared by this court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public lands of the United States;

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land, or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land, or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants,



and each and every one of them; [22]

4. That each and all of the defendants herein, their officers agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land or any part thereof, or in or to any of the minerals, or mineral deposits therein, or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and premises and from in any manner extracting, removing or using any of the minerals deposited in or under said lands and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof;

5. That an accounting may be had by said defendants and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted or received by them or either or any of them, from said land, or any part thereof, and of and all moneys or other property or thing of value received from the sale or disposition of



any and all minerals extracted from said land or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract or agreement concerning said land or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises; [23]

6. That a receiver may be appointed by this court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land or any part thereof for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals, and for the preservation, protection and use of the wells, derricks, pumps, tanks, storage vats, pipes, pipe lines, houses, shops, tools, machinery and appliances being used by the defendants, their officers, agents or assigns in the production, transportation, manufacture or sale of petroleum or other minerals from said land or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery;

7. That the plaintiff may have such other and further relief as in equity may seem just and proper.

To the end therefore that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court directed to the said defendants herein, to wit: American Oilfields Company, Limited, Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, [24] Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then



and there severally, full, true and direct answers make to all and singular the premises but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by, such order, direction and decree as may be made against them, or any of them, in the premises and shall be meet and agreeable to equity.

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,  
United States Attorney.

B. D. TOWNSEND,  
Special Assistant to the Attorney General. [25]

United States of America,  
Southern District of California,  
County of Los Angeles,—ss.

Gratz W. Helm, being first duly sworn, deposes and says:

I am now, and have been for more than four years last past, an employee and agent of the General Land Office, Department of the Interior of the United States; at all times from and after the 1st day of July, 1910, I have been, and am now, Chief of Field Division of the General Land Office of the United States, assigned to duty and in charge of the public lands of the said United States, comprised in the Sixth Field Division in the Southern District of California, including the land described in the foregoing bill of complaint. During all of said times hereinbefore mentioned, under such employment, I have been engaged in field examinations and other investigations on behalf of the Department of the In-



terior with reference to the administration of the public land laws of the United States and the enforcement and protection of the proprietary and other rights of the United States pertaining to said public lands. The acts and transactions referred to in the foregoing bill of complaint with reference to said land in paragraph II thereof described, were investigated by me, as such employee and agent, and under my supervision, direction and control, and in this manner I acquired knowledge thereof. The same are true of my own knowledge, except as to the statements therein made on information and belief, and as to those matters, I believe them to be true.

My knowledge of the facts upon which the prayer for temporary relief by injunction and receivership in said bill is based, was obtained from an inspection of the records of the United States Land Office for the Los Angeles Land District, the records of the office of the county recorder, county of Kern, California, and an inspection and observation of the land described [26] in said bill of complaint, and operations conducted in and upon said land, and upon admissions and statements made by certain of the defendants and their duly authorized officers and agents.

(Signed) GRATZ W. HELM.

Subscribed and sworn to before me this 27th day of February, 1913.

[Seal] (Signed) WM. M. VAN DYKE,  
Clerk of the U. S. District Court for the Southern  
District of California, Southern Division. [27]

**[Motion to Dismiss Bill of Complaint.]**

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIMITED, et al.,

Defendants.

To the Honorable, the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit:

Defendants, American Oilfields Company, Limited, Midland Oilfields Company, Limited, National Pacific Oil Company, Consolidated Midway Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Thirty Thirty-two Land Company, David S. Bachman, Daisy C. Danziger, J. M. Danziger, Edward Fox, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil, hereby move that the Bill of Complaint in the above-entitled action and the whole thereof be dismissed for insufficiency of fact to constitute a valid cause of action in equity against the defendants in this:



That it appears from said Bill of Complaint, that defendants' grantors located said land prior to July 2d, 1910, and under said location defendants entered into the actual possession of said land, and made a discovery of mineral thereon, and that it is not alleged that prior to July 2d, 1910, and on said date defendants were not in the diligent [28] prosecution of work leading to discovery of oil or gas;

That the basis of plaintiff's cause of action depends on an alleged withdrawal of said land on the 27th day of September, 1909, by the President of the United States acting by and through the Secretary of the Interior, and that the alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void and of no force and effect, and beyond the authority of the President and contrary to the provisions of Chapter 6, Title 32 of the Revised Statutes of the United States and the Act of Congress of February 11, 1897, 27 Stat. L. 526, and the Acts amending and supplementing the same;

That it further appears that no withdrawals of the minerals in said land was ever made.

That it appears that this is an action to quiet title, but it is not alleged that plaintiff is in the possession of said land of any part thereof; to the contrary it is alleged that defendants are in possession of the whole thereof;

That it further appears in said Bill of Complaint that defendants by their efforts and expenditures over several years have established the value of said lands to an amount exceeding \$500,000.00 which were



theretofore valueless; that plaintiff seeks the recovery of the land and the improvement thereof, and the oil removed therefrom, without offering to pay for the said improvements or the cost of producing said oil, or to make any allowance therefor;

That it further appears from said Bill of Complaint that [29] plaintiff is seeking the interposition of a court of equity without offering to do equity.

A. L. WEIL,

Solicitor for Defendants, American Oilfields Company, Ltd., Midland Oilfield Co., Ltd., National Pacific Oil Co., Consolidated Midway Oil Co., Pan American Oil Company, Maricopa Consolidated Oil Co., General Petroleum Company, Thirty Thirty-Two Land Co., David S. Bachman, Daisy C. Danziger, J. M. Danziger, Edward Fox, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, Florence G. Weil.

[Endorsed]: No. A-3. In Equity. U. S. District Court, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, vs. American Oilfields Company, et al., Defendants. Motion to Dismiss. Received a copy of this within Motion to Dismiss this 20th day of May, 1913. A. I. McCormick, U. S. Atty. Filed May 20, 1913. Wm. M. Van Dyke, Clerk. By Chas.

N. Williams, Deputy Clerk. A. L. Weil, Attorney at Law, 1206 Alaska Commercial Bldg., San Francisco, Cal. [30]

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No. A-3—IN EQUITY.

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

THE UNITED STATES OF AMERICA,

Plainiff,

versus

AMERICAN OILFIELDS COMPANY. LIMITED, Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Schrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John



V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, and Florence G. Weil,

Defendants.

**Order Overruling Motions to Dismiss, and  
Appointing Receiver.**

WHEREAS, motions to dismiss the bill of complaint in this suit were made by certain of the defendants herein, and were on January 3, 1914, and again on March [31] 21, 1914, were fully argued and submitted; and

WHEREAS, motions by the complainant for the appointment of a Receiver for the interests of the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Schrader, M. S. Platz, American Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil, in the land described in the bill of complaint herein, together with all oil and other property on said land were on March 21, 1914, argued and submitted:

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that the motions of the defendants herein to dismiss are hereby overruled and denied, and each of the said defendants who made said motions to dismiss is allowed five days to file answer in



addition to the time allowed by the New Equity Rules.

IT IS FURTHER ORDERED, that A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Schrader, M. S. Platz, American Oilfields Company, Limited, Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil, to wit:

All the Southeast Quarter of Section Thirty-two, Township Twelve North, Range Twenty-three West, San Bernardino Base and Meridian, situated in Kern County, State of California,  
[32]

and of the oil, gas, and all other property of every kind situated on said land, or already extracted therefrom and still in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property, or any part thereof from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation for them which are the proceeds

of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable. [33]

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.



For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hands as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver and by said solicitors of record, or otherwise as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars, to be approved by this Court, shall be given by the Receiver within five days from the filing of this order; [34] provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond.

The amount of compensation to be paid to the Receiver in this suit is to be determined hereafter.

This April 23, 1915.

M. T. DOOLING,  
United States District Judge.

[Endorsed]. No. A-3—Eq. U. S. District Court,  
Southern District of California, Northern Division.



United States of America, vs. American Oilfields Co. et al. Order Overruling Motions to Dismiss and Appointing Receiver. Filed Apr. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [35]

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No. A-3—IN EQUITY.

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,  
Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C.

Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, and Florence G. Weil,

Defendants.

**Petition for Order Allowing Appeal.**

Midland Oilfields Company, Limited, a corporation, defendant herein, conceiving itself aggrieved by the Order given and rendered on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the above-entitled action, doth [36] hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that part of said order, a copy of which order is hereto annexed, which orders that:

“IT IS FURTHER ORDERED that A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the bill of Complaint herein claimed by the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Shrader, M. S. Platz, American Oilfields Company, Limited, Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil, to wit:

All the Southeast Quarter of Section Thirty-two, Township Twelve North, Range Twenty-



three West, San Bernardino Base and Meridian, situated in Kern County, State of California, and of the oil, gas, and all other property of every kind situated on said land, or already extracted therefrom and in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property, or any part thereof, from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation for them which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver [37] is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the



quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming [38] into his hands as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver and by said solicitors

of record, or otherwise, as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars, to be approved by this Court, shall be given by the Receiver within five days from the filing of this order provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond."

And defendant prays that this, its appeal, may be allowed; and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Dated May 20th, 1915.

A. L. WEIL,

Solicitor for Defendant Midland Oilfields Company,  
Limited.

[Endorsed]: No. A-3—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus American Oilfields Company, Limited, et al., Defendants. Petition for Order Allowing Appeal. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant, Midland Oilfields Company, Ltd. Alaska Commercial Bldg., San Francisco, California. [39]



No. A-3—IN EQUITY.

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,  
Midland Oilfields Company, Limited, El Dora  
Oil Company, National Pacific Oil Company,  
Miocene Oil Company, Consolidated Midway  
Oil Company, Californian Amalgamated Oil  
Company, Pan American Oil Company, Mari-  
copa Consolidated Oil Company, General Pe-  
troleum Company, Independent Oil Produc-  
ers Agency, Phoenix Refining and Manu-  
facturing Company, Standard Oil Company,  
Title Insurance and Trust Company, King  
Lumber Company, Layne and Bowler Com-  
pany of California, Sesame Oil Company,  
Thirty Thirty-two Land Company, J. L.  
Campbell, H. M. Jackson, John Shrader, A. B.  
Coulson, M. S. Platz, J. M. Dunn, C. S. Green,  
T. S. Green, H. H. Hair, Archibald York,  
David S. Bachman, James Bloom, Daisy C.  
Danziger, J. M. Danziger, Edward Fox, Mary  
F. Francis, George C. Haldeman, John V.  
Hoffman, M. E. Hoffman, Benjamin M. Howe,  
Wilbert Morgrage, Mrs. W. Morgrage, Robert  
F. O'Brien, George L. Reynolds, Mrs. George



L. Reynolds, Charles A. Son, Anna W. Mary  
Waite, M. F. Waite, D. C. Wallace, Jr., A. L.  
Weil, and Florence G. Weil,

Defendants.

### **Assignment of Errors.**

Midland Oilfields Company, Limited, a corporation, defendant and appellant herein, having appealed, or being about to appeal, from that certain Order made in the District Court of the United States, for the Southern District of California, [40] Northern Division, Ninth Circuit, on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in an action pending in said court in which The United States of America was plaintiff and the said Midland Oilfields Company, Limited, a corporation, and others, were defendants, by which said order a receiver was appointed to take charge of the property of defendants, and each of them, says, that in the records and proceedings in the said court in the said action, there are manifest errors, and assigns the following as its assignment of errors upon the said appeal:

#### **I.**

That said District Court erred in making said order and appointing a receiver.

#### **II.**

That said District Court, in making said order, erred in this, that said court had not, nor had the Judge thereof, any jurisdiction to make the said order.

#### **III.**

That said District Court erred in making said

order in this, that the said court abused its discretion and permitted an abuse of discretion in making said order.

#### IV.

That said District Court erred in making said order in that the complaint of plaintiff in said action did not show facts justifying the appointment of a receiver.

#### V.

That said District Court erred in making said order, in that the complaint of plaintiff in the said action fails to state any facts entitling the plaintiff herein to any equitable relief whatsoever.

#### VI.

That said District Court erred in making said order, in [41] authorizing and directing the receiver to take possession of the property mentioned in said order.

#### VII.

That said District Court erred in making said order, in this, that defendant at that time and long prior thereto was in the actual and peaceable possession of said property, claiming and holding the same under and by virtue of the laws of the United States, and that in and by the allegations of plaintiff's complaint herein, it appears that the plaintiff was and is out of possession. That it does not appear of record herein that an ancillary suit for the appointment of a receiver had ever been commenced or brought by plaintiff against defendant. That plaintiff had and has a plain, speedy and adequate remedy at law, and said District Court, sitting as a Court of Equity, herein, was and is without author-



ity or jurisdiction to make said order.

In order that the foregoing assignment of errors may be and appear of record, the appellant above-named presents the same to this Court, and prays that such disposition may be made thereof as by the law and the statutes of the United States in such case is made and provided.

A. L. WEIL,  
Solicitor for Defendant and Appellant Midland Oilfields Company, Limited.

[Endorsed]: No. A-3—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus American Oilfields Company, Limited, et al., Defendants. Assignment of Errors. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant, Midland Oilfields Company, Ltd. Alaska Commercial Bldg., San Francisco, California. [42]

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No. A-3—IN EQUITY.

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,  
Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company,



Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. F. Waite, D. C. Wallace, Jr., A. L. Weil, and Florence G. Weil,

Defendants.

**Order Allowing Appeal and Fixing Bond.**

On motion of A. L. Weil, Esq., counsel for defendant, Midland Oilfields Company, Limited, a corporation, and on filing the petition of said defendant for an order allowing an appeal, together with an assignment of errors, IT IS ORDERED that an appeal be and is hereby allowed to the United States [43] Circuit Court of Appeals, for the Ninth Cir-

cuit, from the order given and made herein on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit, appointing a receiver to take charge of the property of defendants, and each of them.

That the amount of the bond upon said appeal be and is hereby fixed at the sum of \$ — if the writ of supersedeas is desired.

That upon the execution and approval of said bond by this Court, a writ of supersedeas issue under the seal of this Court, directed to plaintiff herein, its agents and servants, and the receiver appointed herein under said order, that they desist and refrain from, in any manner, interfering with the North half of the Northwest quarter and the North half of the South half of Northwest quarter of said property, or in any manner enforcing or attempting to enforce said order of the 23d day of April, 1915, against Midland Oilfields Company, Limited, until said appeal be heard and determined, or the further order of this Court. If the supersedeas is M.T.D. desired appellant may apply therefor to the Court of Appeals.

Dated May 21, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: No. A-3—In Equity. District Court of United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, versus American Oil-



fields Company, Limited, et al., Defendants. Order Allowing Appeal and Fixing Bond. Filed May 21, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. A. L. Weil, Solicitor for Defendant Midland Oilfields Company, Ltd. Alaska Commercial Bldg., San Francisco, California. [44]

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**[Bond on Appeal.]**

KNOW ALL MEN BY THESE PRESENTS: That we, Midland Oilfields Company, Ltd., a corporation, as princioal, and G. J. Syminton and R. E. Maynard, as sureties, are held and firmly bound unto The United States of America in the full and just sum of Five Hundred Dollars, to be paid to the said The United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of May, in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS, lately at a District Court of the United States of the Southern District of California, Northern Division, Ninth Circuit, in a suit depending in said court, between The United States of America, Plaintiff, vs. American Oilfields Company, Ltd., et al., Defendants, in which an order overruling motion to dismiss, and appointing a Receiver was rendered against the Midland Oilfields Company, Ltd., and the said Midland Oilfields Company, Ltd., having obtained from said court an order allowing an appeal to reverse the said order in the aforesaid suit,



and a citation directed to the said The United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Midland Oilfields Company, Ltd., shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

MIDLAND OILFIELDS COMPANY, Ltd.

[Seal]

J. C. ANDERSON,  
Vice-president.

G. J. SYMINTON.

R. E. MAYNARD.

Acknowledged before me the day and year first above written.

[Seal]

BERTHA L. MARTIN,  
Notary Public in and for the County of Los Angeles,  
State of California. [45]

United States States of America,  
Northern District of California,—ss.

G. J. Syminton and R. E. Maynard being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

G. J. SYMINTON.  
R. E. MAYNARD.

Subscribed and sworn to before me, this 21st day  
of May, A. D. 1915.

[Seal]                      BERTHA L. MARTIN,  
Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: No. A-3—In Equity. United States District Court for the Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff, vs. American Oilfields Company, Ltd., a corporation, et al., Defendants. Bond on Appeal of Midland Oilfields Company, Ltd. Form of Bond and Sufficiency of Sureties Approved. M. T. Dooling, Judge. Filed Jun. 1, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [46]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern Dis-  
trict of California, Northern Division.*

No. A-3—EQ.

Clerk's Office.

THE UNITED STATES OF AMERICA,

VS.

AMERICAN OILFIELDS COMPANY, LTD.,  
et. al.,

**Praeipce [for Transcript of Record on Appeal].**  
To the Clerk of Said court.

Sir: Please issue Transcript of record on appeal of defendant, Midlands Oilfields Company, Limited, in the above-entitled case, containing copies of the following papers therein, viz.:

1. Bill of Complaint;
2. Motion of Said Defendant to Dismiss Bill of Complaint;
3. Order Overruling Motion to Dismiss and Appointing Receiver;
4. Petition for Order Allowing Appeal, Omitting Therefrom Copy of Order Overruling Motion to Dismiss, etc., Attached Thereto;
5. Assignment of Errors;
6. Order Allowing Appeal, and Fixing Bond; and
7. Bond on Appeal.

A. L. WEIL,  
Solicitor for Midlands Oilfields Co., Ltd. [47]

[Endorsed]: No. A-3 Eq. U. S. District Court Southern District of California, Northern Division, United States vs. American Oilfields Co., Ltd., et al. Praecipe for Transcript on Appeal of Midland Oilfields Co., Ltd. Filed Aug. 26, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [48]



**[Certificate of Clerk U. S. District Court to  
Transcript of Record on Appeal.]**

*In the District Court of the United States, in and  
for the Southern District of California, North-  
ern Division.*

No. A-3—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIM-  
ITED, Midland Oilfields Company, Limited,  
El Dora Oil Company, National Pacific Oil  
Company, Miocene Oil Company, Consolidated  
Midway Oil Company, Californian Amalga-  
mated Oil Company, Pan American Oil Com-  
pany, Maricopa Consolidated Oil Company,  
General Petroleum Company, Independent  
Oil Producers Agency, Phoenix Refining and  
Manufacturing Company, Standard Oil Com-  
pany, Title Insurance and Trust Company,  
King Lumber Company, Layne and Bowler  
Company of California, Sesame Oil Company,  
Thirty Thirty-Two Land Company, J. L.  
Campbell, H. M. Jackson, John Shrader, A. B.  
Coulson, M. S. Platz, J. M. Dunn, C. S. Green,  
T. J. Green, H. H. Hair, Archibald York,  
David S. Bachman, James Bloom, Daisy C.  
Danziger, J. M. Danziger, Edward Fox, Mary  
F. Francis, George C. Haldeman, John V.  
Hoffman, M. E. Hoffman, Benjamin M. Howe,

Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing forty-eight (48) typewritten pages, numbered from 1 to 48, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Motion to Dismiss Bill of Complaint, [49] Order Overruling Motion to Dismiss and Appointing Receiver, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Bond, Bond on Appeal and Praecipe for Transcript in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the defendant and appellant, Midland Oilfields Company, by its attorney of record;

I do further certify that the cost of the foregoing record is \$27.25, the amount whereof has been paid me by the Midland Oilfields Company, the appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 8th day of September, in the year of our Lord,

one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
9/8/15. L. S. C.] [50]

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[Endorsed]: No. 2659. United States Circuit Court of Appeals for the Ninth Circuit. Midland Oilfields Company, Limited, a Corporation, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed September 21, 1915.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals,  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk. [51]



**[Order Allowing Appellant to and Including August  
19, 1915, to File Transcript on Appeal.]**

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

No. A-3—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

AMERICAN OILFIELDS COMPANY, LTD.

et al.,

Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant, Midland Oilfields Company, Limited, have sixty (60) days further time in addition to the time heretofore allowed, within which to file its transcript on appeal in the above-entitled suit with the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated, August 16, 1915.

ROSS,

Circuit Judge.

[Endorsed]: No. 2659. United States Circuit Court of Appeals, for the Ninth Circuit. United States of America, vs. American Oilfields Company, Ltd., et al. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 21, 1915. F. D. Monckton, Clerk.

**[Order Allowing Appellant to and Including October 18, 1915, to File Transcript on Appeal.]**

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

No. A-3—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

AMERICAN OILFIELDS COMPANY, LTD.  
et al.,

Defendants and Appellants.

Good cause being shown therefor,

IT IS HEREBY ORDERED that the appellant, Midland Oilfields Company, Limited, have sixty (60) days additional and further time from the 20th day of June, 1915, within which to file its transcript on appeal in the above-entitled suit with the clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated June 16, 1915.

M. T. DOOLING,

Judge of the District Court.

[Endorsed]: No. A-3—In Equity. U. S. District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff and Respondent, vs. American Oilfields Company, Ltd., et al., Defendants and Appellants. Order Extending Time to File Transcript on Appeal.

Filed Jun. 17, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

No. 2659. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Oct. 18, 1915, to File Record thereof and to Docket Case. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 21, 1915. F. D. Monckton, Clerk.



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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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EL DORA OIL COMPANY, J. L. CAMPBELL,  
H. M. JACKSON and JOHN SHRADER,  
Doing Business Under the Firm Name of  
OHIO VALLEY CONSTRUCTION COM-  
PANY, and JOHN SHRADER and T. J.  
GREEN,

Appellants,

vs.

THE UNITED STATES OF AMERICA,  
Appellee.

---

**Transcript of Record.**

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Upon Appeal from the United States District Court  
for the Southern District of California,  
Northern Division.

---

Filed

OCT 1 - 1915

F. D. Monckton,  
Clerk



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

EL DORA OIL COMPANY, J. L. CAMPBELL,  
H. M. JACKSON and JOHN SHRADER,  
Doing Business Under the Firm Name of  
OHIO VALLEY CONSTRUCTION COM-  
PANY, and JOHN SHRADER and T. J.  
GREEN,

Appellants,

vs.

THE UNITED STATES OF AMERICA,  
Appellee.

---

**Transcript of Record.**

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Upon Appeal from the United States District Court  
for the Southern District of California,  
Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys.**

For Appellants:

GEORGE E. WHITAKER, Esq., Bakersfield,  
California; and

E. L. FOSTER, Esq., Bakersfield, California.

For Appellees:

THOMAS W. GREGORY, Esq., Attorney-General  
of the United States, Washington, D. C.;

ALBERT SCHOONOVER, Esq., U. S. Attorney,  
Los Angeles, California; and

E. J. JUSTICE, Esq., Special Assistant to the  
Attorney-General, Postoffice Building, San  
Francisco, California. [3\*]

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*In the District Court of the United States, for the  
Southern District of California, Northern Division,  
Ninth Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,  
Plaintiff and Respondent,

vs.

AMERICAN OILFIELDS COMPANY, LIMITED et al.,

Defendants,

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\*Page-number appearing at foot of page of certified Transcript of Record.

EL DORA OIL COMPANY, J. L. CAMPBELL,  
H. M. JACKSON and JOHN SHRADER,  
Doing Business Under the Firm Name of  
OHIO VALLEY CONSTRUCTION COM-  
PANY, and JOHN SHRADER, and T. J.  
GREEN,

Defendants and Appellants.

**Citation on Appeal.**

United States of America,—ss.

*To* United States of America, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at United States Circuit Court of Appeal, Ninth Circuit of United States to be holden at San Francisco, California, on the 14th day of July, 1915, pursuant to an appeal filed in the clerk's office of the United States District Court, in and for the Southern District of California, Northern Division, Ninth Circuit, wherein the El Dora Oil Company, J. L. Campbell, H. M. Jackson and John Shrader, doing business under the firm name of Ohio Valley Construction Company, and John Shrader and T. J. Green, are appellants, and United States of America is respondent, to show cause, if any there be, why the judgment in the said Writ of Error mentioned, should not be accorded, and speedy justice should not be done to the parties on that behalf. [4]

WITNESS, Hon BENJAMIN F. BLEDSOE,  
this 16th day of June, in the year of our Lord 1915.

BLEDSOE, J.,  
District Judge. [5]

Received copy of the within citation this 16th day of June, 1915.

ALBERT SCHOONOVER,  
United States Attorney. [6]

[Endorsed]: (Original) No. A. 3. In Equity. In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit. The United States of America, Plaintiff and Respondent, vs. American Oilfields Company, Limited, et al., Defendants. Citation on Appeal. Filed Jun. 16, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

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*In the District Court of the United States, in and for  
the Southern District of California, Northern  
Division.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIMITED; Midland Oilfields Company, Limited; El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust



Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr.; A. L. Weil and Florence G. Weil,

Defendants. [7]

No. A-3—IN EQUITY.

*In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIMITED, et al.,

Defendants.

**Bill of Complaint.**

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,  
United States Attorney.

B. D. TOWNSEND,  
Special Assistant to the Attorney General.

Filed Feb. 27, 1913. Wm. M. Van Dyke, Clerk.  
By Chas. N. Williams, Deputy Clerk. [8]

No. A-3—IN EQUITY.

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIMITED; Midland Oilfields Company, Limited; El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil

Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr.; A. L. Weil and Florence G. Weil,

Defendants. [9]

To the Judges of the District Court of the United States for the Southern District of California, Sitting Within and for the Northern Division of Said District:

The United States of America, by George W. Wickersham, its Attorney General, presents this, its Bill in Equity, against American Oilfields Company, Limited; Midland Oilfields Company, Limited; El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of



California, Sesame Oil Company, Thirty Thirty-Two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr.; A. L. Weil and Florence G. Weil (citizens and residents, respectively, as stated in the next succeeding paragraph of this bill), and in that behalf the plaintiff complains and alleges:

I.

Each of the defendants American Oilfields Company, Limited, National Pacific Oil Company, Miocene Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company and [10] Thirty Thirty-Two Land Company, now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the State of California, and is a resident and citizen of said state. Each of the defendants El Dora Oil Company, Consolidated Midway Oil Company, Pan American Oil Company and Maricopa Consolidated Oil Company now is, and at all the times hereinafter mentioned

as to it was, a corporation organized under the laws of the former territory, now state, of Arizona, and is a resident and citizen of said state.

The defendant Midland Oilfields Company, Limited, now is, and at all the times herein mentioned as to it was, a corporation organized under the laws of the state of Delaware, and is a resident and citizen of said state.

The defendant Californian Amalgamated Oil Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of Great Britain, and is a resident and citizen of Great Britain.

The defendants J. L. Campbell, H. M. Jackson and John Shrader now are, and at all the times hereinafter mentioned as to them were, copartners doing business under the firm name of "Ohio Valley Construction Company," their principal place of business being located at Chester, state of West Virginia; and each of said last-named defendants is a resident and citizen of said state of West Virginia.

Except as hereinbefore stated each of the defendants herein is a resident and citizen of the state of California.

The defendant Mary F. Francis now is, and at all the times since January 16, 1909, has been, a widow, The defendant J. M. Danziger is the husband of the defendant Daisy C. Danziger. The defendant Wilbert Morgrage is the husband of the defendant Mrs. W. Morgrage. The defendant George L. Reynolds is the husband of the defendant Mrs. George L. Reynolds. The defendant M. P. Waite is the hus-



band of the defendant Anna W. Mary Waite. The defendant A. L. Weil is the husband of the defendant Florence G. [11] Weil. The defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman are sued in their own right, respectively, and also as trustees under a certain purported trust deed hereinafter mentioned.

The defendant Title Insurance and Trust Company is sued in its own right, and also as trustee, under a certain purported mortgage deed hereinafter mentioned.

The defendant M. S. Platz is sued in his own right, and also as trustee under a certain purported trust deed hereinafter mentioned.

Certain of the defendants are described herein otherwise than by Christian name, for the reason that the Christian name of each of said defendants is unknown to plaintiff.

## II.

The plaintiff now is, and ever since the Treaty of Guadalupe Hidalgo has been, the owner and entitled to the immediate and exclusive possession and enjoyment of all the land next hereinafter described, and of all mineral oil, petroleum, gas and other minerals therein contained, said land being particularly described as follows, to wit: All the southeast quarter of section thirty-two, township twelve north, range twenty-three west, San Bernardino base and meridian, situated in Kern county, State of California. All of said land at all said times has been, and



now is, a part of the public domain of the United States, except as withdrawn and reserved from entry as hereinafter alleged. All of said land now is, and at all times has been, oil-bearing land, containing rich deposits of petroleum or mineral oil and gas in commercially paying quantities, and at all times has been, and now is, chiefly valuable for the petroleum or mineral oil and gas deposited therein, and has never contained any minerals other than petroleum or mineral oil and gas. [12]

### III.

On September 14, 1908, the Secretary of the Interior of the United States of America duly and regularly withdrew and reserved the land hereinbefore described (together with other contiguous public lands) from settlement, entry or purchase under the agricultural land laws of the United States for the purpose of examining and classifying said lands.

On June 9, 1909, the land hereinbefore described (together with other contiguous public lands) was duly and regularly classified by the Secretary of the Interior as petroleum—or oil-bearing lands, which said order of classification ever since said last-named date has been, and still is, in full force and effect.

On September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other contiguous public lands) from mineral exploration, and from all forms of location, settlement, selection, filing, entry

or disposal under the mineral or nonmineral public land laws of the United States; and since said last-named date none of said land has been subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States.

On July 2, 1910, the President of the United States, under the authority legally invested in him so to do, and especially by virtue of the provisions of the act of Congress approved June 25, 1910, entitled "An Act to Authorize the President of the United States to Make Withdrawal of Public Lands in Certain Cases" (36 Stat. 847), duly and regularly ratified, affirmed and continued in full force and effect said order of withdrawal and reservation of September 27, 1909, and did further withdraw and reserve all [13] said land from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States, subject only to the provisions of said act of Congress. Each of said orders of withdrawal and reservation, ever since the dates thereof, respectively, has been, and now is, in full force and effect.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and the lawful orders and proclamations of the President of the United States, the defendants herein, subsequent to January 1, 1910, entered upon the land hereinbefore particularly described, pretended to acquire, and now assert, mineral rights therein, or



some part thereof, and have committed and are now committing trespass and waste thereupon, as more particularly hereinafter set forth.

#### IV.

On July 4, 1910, the defendant Consolidated Midway Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon the land hereinbefore described, and thereafter drilled and caused to be drilled an oil well thereupon, and thereafter operated said oil well, and extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

During the month of December, 1910, said defendant Consolidated Midway Oil Company surrendered possession of said oil well to the defendant National Pacific Oil Company, and ever since said last named date the defendant National Pacific Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, has operated and still is operating said oil well, and has drilled and caused to be drilled other oil wells upon said land, and has operated [14] and still is operating said last-named oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 4, 1910, each of the defendants American Oilfields Company, Limited, Midland Oilfields Company, Limited, El Dora Oil Company and Miocene Oil Company, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and there-



after drilled and caused to be drilled an oil well or oil wells thereupon, and thereafter has operated and still is operating said oil well or oil wells, and has extracted from said land and appropriated to its use large quantities of petroleum or mineral oil and gas.

Subsequent to July 5, 1910, each of the defendants Californian Amalgamated Oil Company, Pan American Oil Company and Maricopa Consolidated Oil Company, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, entered upon said land, and thereafter drilled and caused to be drilled an oil well or oil wells thereupon, and is still engaged in drilling an oil well or oil wells upon said land for the purpose of extracting from said land and appropriating to their use, respectively, the petroleum or mineral oil and gas deposited in said land. The plaintiff does not know whether said three last-mentioned defendants, or either of them, have heretofore extracted from said land any petroleum or mineral oil or gas, and has no means of ascertaining the true facts in the premises, except from said defendants; therefore, a full discovery in the premises is sought herein.

The nine defendants last hereinbefore mentioned are hereinafter described collectively as "operators." [15]

Said operators entered upon said land, drilled oil wells thereupon, and extracted and are extracting petroleum or mineral oil and gas therefrom as aforesaid, claiming the right so to do under and by virtue of one or more of five certain pretended notices of

mining location, to wit:

(1) That certain pretended notice of mining location purporting to have been signed by John Conley, Josephine Conley, A. E. Brown, James Hawley, Lillian Hawley, Ira P. Goodwin and Leslie Francis, bearing date January 1, 1907, and recorded January 4, 1907, in book 42 of mining records, at page 121, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Elaine" Placer Mining Claim;

(2) That certain pretended notice of mining location purporting to have been signed by Julius Fried, Parker Barrett, J. M. Dunn, Lena Dunn, Edward Haigh, Emma Haigh, Oma Barrett and W. L. O'Leary (bearing no date), recorded February 3, 1910, in book 80 of mining records, at page 367, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Warrior No. 3" Placer Mining Claim;

(3) That certain pretended notice of mining location purporting to have been signed by Wilbert Morgrage, George L. Reynolds, D. C. Wallace, Jr.; Robert F. O'Brien, Mrs. W. Morgrage, J. M. Danziger, Mrs. George L. Reynolds and Daisy C. Danziger (bearing no date), recorded July 19, 1910, in book 86 of mining records, at page 380, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Daisy No. 4" Placer Mining Claim;



(4) That certain pretended notice of mining location purporting to have been signed by T. A. O'Donnell, J. C. Anderson, E. L. Doheny, C. A. Canfield, J. M. Danziger, Norman Bridge, L. McCray and J. E. O'Donnell (bearing no date), recorded October 7, 1910, in book 88 of mining records, at page 149, in the office of the [16] county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "New Era No. 2" Placer Mining Claim;

(5) That certain pretended notice of mining location purporting to have been signed by E. A. Wiltsee, O. E. Monnette, M. J. Monnette, R. P. Davie, J. R. McKinnie, G. G. Gillette, A. E. Perris and Lytle Hull (bearing no date), recorded October 18, 1910, in book 88 of mining records, at page 168, in the office of the county recorder of Kern county, California, in which said pretended notice of mining location said land is described as the "Standard No. 1" Placer Mining Claim.

By each of said pretended notices of mining location an interest in all of said land and the right to extract minerals therefrom were asserted under the placer mining laws of the United States, and said operators claim under one or more of said pretended notices of mining location by right of succession from said original pretended locators, or some of them, by virtue of some pretended conveyance, leases or assignments, and not otherwise. The plaintiff does not know definitely under which of said pretended notices of mining location said operators claim, respectively, and, therefore, leaves said defendants to



set forth their respective claims of interest.

V.

No work of exploration or development for the discovery of petroleum, mineral oil or gas, or any other mineral, was ever commenced or prosecuted, in good faith or otherwise, or at all, upon any part of said land under either or any of said placer mining claims hereinbefore described, or otherwise, by or on behalf of said pretended locators, or either or any of them, or any of their alleged successors in interest, or any of the defendants herein, or otherwise, or at all, prior to July 4, 1910.

No discovery of any mineral (other than petroleum or mineral oil and gas) has ever been made in or upon any part of said land. Neither petroleum, mineral oil nor gas was ever discovered [17] in or upon any part of said land prior to October 10, 1910; and because of the premises of this bill, no valid discovery of petroleum, mineral oil or gas (within the meaning of the mineral land laws of the United States) was ever made in or upon any part of said land.

No valid location or entry of or claim to said land or any part thereof, under any public land law of the United States, or otherwise, was ever made or acquired by said pretended locators, or either or any of them, or by any of their alleged successors in interest, or by the defendants herein, or either or any of them, or by any person or persons, corporation or corporations, or at all.

Except as set forth in this bill, no claim of any right, title or interest in or to, or lien upon, any of

said land, or to the use or possession thereof, or to any of the minerals therein contained, is asserted by or on behalf of any person or persons, corporation or corporations, or at all.

Each and all of the claims asserted by the defendants herein, and each of them, in or to said land, or any part thereof, or the use or possession thereof, or the minerals deposited therein, are based solely upon the pretended placer mining locations hereinbefore described.

Prior to January 1, 1910, no person or association or corporation was a *bona fide* occupant or claimant of any part of said land, engaged in the diligent or other prosecution of work leading to the discovery of oil or gas, or any other mineral.

## VI.

The plaintiff does not know the exact quantity of petroleum, mineral oil or gas extracted from said land and appropriated by the defendants hereinbefore described as “operators,” or any of them as aforesaid, and has no means of ascertaining the true [18] facts in the premises except from the defendants; and, therefore, a full discovery in the premises is sought herein.

Plaintiff is informed and believes, and therefore alleges, that a large part, if not all, of the petroleum or mineral oil and gas extracted from said land and appropriated by said “operators” as aforesaid, was by said “operators,” respectively, sold to the defendants, Standard Oil Company, General Petroleum Company, Independent Oil Producers Agency, Pheonix Refining and Manufacturing Company, J.



L. Campbell, H. M. Jackson and John Shrader, and was by said last named defendants, respectively, appropriated to their own use and benefit. The plaintiff does not know the exact quantity of petroleum or mineral oil and gas sold to and appropriated by said last named defendants, respectively, or either of them, or the price paid therefor, or the profits realized therefrom, and has no means of ascertaining the true facts in the premises except from the defendants herein; therefore, a full discovery in the premises is sought herein.

The plaintiff does not know the exact quantity of petroleum or mineral oil and gas, if any, sold by said "operators," or any of them, to parties other than as stated above, or the name or names of said purchaser or purchasers, if any, or the price received therefor, or the price realized therefrom, and has no means of ascertaining the true facts in the premises, except from the defendants herein; therefore, a full discovery in the premises is sought herein.

## VII.

Each of the defendants hereinbefore described as "operators" now continue and threaten, and unless restrained therefrom will continue, to operate the aforesaid oil wells and extract from said land petroleum or mineral oil and gas in large quantities, and to drill other oil wells upon said land and operate the same and extract from said land petroleum or mineral oil and gas, and otherwise commit trespass and waste upon said land, to the great and irreparable injury of this plaintiff. [19]



## VIII.

Each of the defendants David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Thirty Thirty-Two Land Company, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil and Florence G. Weil claims some right, title or interest in said land and the right to extract minerals therefrom under one or more of said pretended notices of mining location, either as original locators thereof, or by virtue of some pretended conveyances, leases or assignments from certain of said pretended locators. The plaintiff does not know definitely the nature or the alleged basis of said claims of interest, and, therefore, leaves said defendants to set forth herein their respective claims of interest.

Each of said defendants last herein named, either directly or through some agent or attorney, wrongfully and unlawfully and in violation of the proprietary and other rights of this plaintiff, heretofore entered into possession of some part of said land, and now continues and threatens, and unless restrained therefrom will continue, to hold possession thereof, and further threatens to, and unless restrained therefrom will, drill oil wells thereupon and extract petroleum or mineral oil and gas therefrom, and otherwise commit trespass and waste thereupon,

to the great and irreparable injury of this plaintiff.

IX.

The defendant Title Insurance and Trust Company, claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain instrument in writing dated March 7, 1911, purporting to have been executed by the defendant Consolidated Midway Oil Company, wherein and whereby the [20] defendant Consolidated Midway Oil Company purported to mortgage to said Title Insurance and Trust Company certain of the aforesaid land (together with other land) to secure the payment of a certain indebtedness purported to be owing by said defendant Consolidated Midway Oil Company to the defendant A. B. Coulson, and the defendant A. B. Coulson claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of the instrument last herein described.

The defendant M. S. Platz claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain instrument in writing bearing date February 16, 1912, purporting to have been executed by the defendant El Dora Oil Company, wherein and whereby the defendant El Dora Oil Company purported to mortgage to the defendant M. S. Platz certain of said land to secure the payment of a certain indebtedness purported to be owing by the defendant El Dora Oil Company to the defendant John Schrader; and the defendant John Schrader claims some right, title or interest in or to, or lien upon, said land, or upon some part



thereof, by virtue of the instrument last herein described.

The defendants A. L. Weil, Florence G. Weil, J. M. Danziger, Daisy C. Danziger, M. P. Waite, Anna W. Mary Waite, Charles A. Son and David S. Bachman claim some right, title or interest in or to said land, or some part thereof, or lien thereupon, individually, and also as trustee for the defendant Thirty Thirty-Two Land Company under some pretended conveyance or deed of trust, the particulars whereof are unknown to plaintiff; and the defendant Thirty Thirty-Two Land Company claims some right, title or interest in or to said land, or some part thereof, or lien thereupon, by virtue of said pretended conveyance or deed of trust.

The defendant General Petroleum Company claims some right, title or interest in or to said land, or lien thereupon, under some pretended conveyance, assignment or other instrument purporting [21] to have been executed by the defendant Thirty Thirty-Two Land Company or by some of the other defendants named herein, the particulars whereof are unknown to plaintiff.

## X.

The defendant J. M. Dunn claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded November 17, 1910, in book 4 of attachments, at page 402, in the records of Kern county, California.

The defendant C. S. Green claims some right, title



or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded November 22, 1911, in book 5 of attachments, at page 132, in the records of Kern county, California.

The defendant T. J. Green claims some right, title or interest in or to, or lien upon said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded February 28, 1912, in book 5 of attachments, at page 227, in the records of Kern county, California.

The defendant H. H. Hair claims some right, title or interest in or to, or lien upon said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded January 3, 1912, in book 5 of attachments, at page 174, in the records of Kern county, California.

The defendant King Lumber Company claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded February 16, 1912, in book 5 of attachments, at page 217, in the records of Kern county, California.

The defendant Layne and Bowler Company of California claims some right, title or interest in or to, or lien upon, said land, [22] or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment

recorded June 19, 1912, in book 5 of attachments, at page 291, in the records of Kern county, California.

The defendant Sesame Oil Company claims some right, title or interest in or to, or lien upon, said land, or some part thereof, by virtue of a certain pretended attachment lien asserted under a certain notice of attachment recorded May 5, 1911, in book 4 of attachments, at page 489, in the records of Kern county, California.

The defendant Archibald York claims some right, title or interest in or to said land, or some part thereof, by virtue of a certain sheriff's certificate of the sale of said land, or some part thereof, recorded October 11, 1911, in book 3 of certificates of sale, at page 214, in the records of Kern county, California.

## XI.

Except as in this bill stated, plaintiff has no knowledge or information concerning the exact nature or alleged basis of any of the claims asserted by the defendants herein, or any of them; and, therefore, leaves said defendants to set forth their respective claims of interest.

In that behalf plaintiff alleges that, because of the premises of this bill, none of the defendants have or ever had any right, title or interest in or to, or lien upon, said land, or any part thereof, or any right or interest in or to the petroleum or mineral oil or gas deposited therein, or any right to extract petroleum or mineral oil or gas, or any other mineral from said land or any part thereof. On the contrary, each of said pretended placer mining locations is, and at all times has been, void and of no effect; and no rights



whatever were ever acquired thereunder; and each and all of the aforesaid acts of the defendants herein in asserting an interest in or to said land, and in entering upon and taking and holding possession thereof, and in drilling and constructing oil wells thereupon, and in extracting, using and appropriating the petroleum or mineral oil and gas deposited [23] therein, were and are in violation of the laws of the United States and the aforesaid orders withdrawing and reserving said land, and all of said acts were and are in violation of the proprietary and other rights of this plaintiff.

## XII.

The present value of the land hereinbefore described exceeds one million (1,000,000) dollars.

In consideration whereof, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity, where matters of this nature are properly cognizable and relievable, plaintiff prays:

1. That said defendants, and each of them, may be required to make full, true and direct answer, respectively, to all and singular the matters and things hereinbefore stated and charged and to fully disclose and state their claims to said land hereinbefore described, and to any and to all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived;

2. That the said land may be declared by this court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn



from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States.

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land, or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land, or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them; [24]

4. That each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land or any part thereof, or in or to any of the minerals, or mineral deposits therein, or thereunder contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and premises and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion

thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof;

5. That an accounting may be had by said defendants and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted or received by them or either or any of them, from said land, or any part thereof, and of any and all moneys or other property or thing of value received from the sale or disposition of any and all minerals extracted from said land or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract or agreement concerning said land or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises; [25]

6. That a receiver may be appointed by this Court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land or any part thereof for the



purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals, and for the preservation, protection and use of the wells, derricks, pumps, tanks, storage vats, pipes, pipe lines, houses, shops, tools, machinery and appliances being used by the defendants, their officers, agents or assigns in the production, transportation, manufacture or sale of petroleum or other minerals from said land or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery;

7. That the plaintiff may have such other and further relief as in equity may seem just and proper.

To the end therefore that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please Your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to the said defendants herein, to wit, American Oilfields Company, Limited; Midland Oilfields Company, Limited; El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, [26] Thirty Thirty-Two Land Company,



J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr.; A. L. Weil and Florence G. Weil, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there severally, full, true and direct answers make to all and singular the premises but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by, such order, direction and decree as may be made against them, or any of them, in the premises and shall be meet and agreeable to equity.

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

A. I. McCORMICK,  
United States Attorney.

B. D. TOWNSEND,  
Special Assistant to the Attorney General.

United States of America,  
Southern District of California,  
County of Los Angeles,—ss.

Gratz W. Helm, being first duly sworn, deposes and says:

I am now, and have been for more than four years last past, an employee and agent of the General Land Office, Department of the Interior of the United States; at all times from and after the 1st day of July, 1910, I have been, and am now, Chief of Field Division of the General Land Office of the United States, assigned to duty and in charge of the public lands of the said United States, comprised in the Sixth Field Division in the Southern District of California, including the land described in the foregoing bill of complaint. During all of said times hereinbefore mentioned, under such employment, I have been engaged in field examinations and other investigations on behalf of the Department of the Interior, with reference to the administration of the public land laws of the United States and the enforcement and protection of the proprietary and other rights of the United States pertaining to said public lands. The acts and transactions referred to in the foregoing bill of complaint with reference to said land in paragraph II thereof described, were investigated by me, as such employee and agent, and under my supervision, direction and control, and in this manner I acquired knowledge thereof. The same are true of my own knowledge, except as to the statements therein made

on information and belief, and as to those matters, I believe them to be true.

My knowledge of the facts upon which the prayer for temporary relief by injunction and receivership in said bill is based, was obtained from an inspection of the records of the United States Land Office for the Los Angeles Land District, the records of the office of the county recorder, county of Kern, California, and an inspection and observation of the land described [28] in said bill of complaint, and operations conducted in and upon said land, and upon admissions and statements made by certain of the defendants and their duly authorized officers and agents.

(Signed.) GRATZ W. HELM.

Subscribed and sworn to before me this 27th day of February, 1913.

[Seal] (Signed.) WM. M. VAN DYKE,  
Clerk of the U. S. District Court for the Southern  
District of California, Southern Division. [29]

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*In the District Court of the United States, Southern  
District of California, Northern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIMITED,  
et al.,

Defendants.



**Motion to Dismiss.**

To the Honorable Judge of the District Court of the United States for the Southern District of California, Northern Division of Said District of California:

Now come the defendants El Dora Oil Company, a corporation, J. L. Campbell, H. M. Jackson and John Shrader, copartners doing business under the firm name of Ohio Valley Construction Company, and move that the Bill of Complaint in the above-entitled action, and the whole thereof be dismissed, for insufficiency of facts to constitute a valid cause of action in equity against these defendants.

That it appears from said Bill of Complaint that the defendants entered upon the land described therein prior to the 1st day of April, 1910, and continued drilling a well thereon for the purpose of discovery of oil;

That defendants, from the 1st day of April, 1910, were continuing in diligent prosecution of work in good faith leading to discovery of oil on said land until or about October, 1910, when oil was discovered thereon in paying quantities;

That defendants were in diligent prosecution of work in good faith leading to discovery of oil, on the 2d day of July, [30] 1910, claiming under Mineral Locations made prior to the 6th day of March, 1910;

That the basis of plaintiff's cause of action depends on an alleged withdrawal of said lands, described in plaintiff's Bill of Complaint, on the 27th

day of September, 1909, by the Honorable, the Secretary of the Interior of the United States, and that the said alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void, and of no force and effect, and beyond the authority of the Secretary of the Department of the United States, and contrary to the provisions of Chapter VI of Title 32 of the Revised Statutes of the United States, and the "Act of Congress of February 11, 1897," at L. 526, and the Acts Amendatory thereof and Supplemental thereto.

That it further appears that no withdrawal of mineral *is* said land has been made.

M. S. PLATZ,

E. L. FOSTER,

Attorneys for Defendants Above Named.

[Endorsed]: A-3—Equity. In the District Court of the United States, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. American Oilfields Company, Limited, et al., Defendants. Motion to Dismiss. Filed April 23, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [31]

No. A-3—IN EQUITY.

*In the District Court of the United States, Southern  
District of California, Northern Division, Ninth  
Circuit.*

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED;

Midland Oilfields Company, Limited; El Dora  
Oil Company, National Pacific Oil Company,  
Miocene Oil Company, Consolidated Midway  
Oil Company, Californian Amalgamated Oil  
Company, Pan American Oil Company, Mari-  
copa Consolidated Oil Company, General  
Petroleum Company, Independent Oil Pro-  
ducers Agency, Phoenix Refining and Manu-  
facturing Company, Standard Oil Company,  
Title Insurance and Trust Company, King  
Lumber Company, Layne and Bowler Com-  
pany of California, Sesame Oil Company,  
Thirty Thirty-two Land Company, J. L.  
Campbell, H. M. Jackson, John Shrader, A.  
B. Coulson, M. S. Platz, J. M. Dunn, C. S.  
Green, T. J. Green, H. H. Hair, Archibald  
York, David S. Bachman, James Bloom,  
Daisy C. Danziger, J. M. Danziger, Edward  
Fox, Mary F. Francis, George C. Haldeman,  
John V. Hoffman, M. E. Hoffman, Benjamin  
M. Howe, Wilbert Morgrage, Mrs. W. Mor-  
grage, Robert F. O'Brien, George L. Rey-



nolds, Mrs. George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr.; A. L. Weil, and Florence G. Weil,

Defendants.

**Order Overruling Motions to Dismiss, and  
Appointing Receiver.**

WHEREAS, motions to dismiss the Bill of Complaint in this suit were made by certain of the defendants herein, and were on January 3, 1914, and again on March [32] 21, 1914, were duly argued and submitted; and

WHEREAS, motions by the complainant for the appointment of a receiver for the interests of the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Shrader, M. S. Platz, American Oilfields Company, Limited, Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil in the land described in the Bill of Complaint herein, together with all oil and other property on said land were on March 21, 1914, argued and submitted;

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that the motions of the defendants herein to dismiss are hereby overruled and denied, and each of the said defendants who made said motions to dismiss is allowed five days to file answer in addition to the time allowed by the New Equity Rules.

IT IS FURTHER ORDERED that A. E. Campbell, Esq., be, and he is hereby appointed Receiver of the property described in the Bill of Complaint herein claimed by the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Shrader, M. S. Platz, American Oilfields Company, Limited, Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil, to wit: All the Southeast quarter of Section Thirty-two Township Twelve North, Range Twenty-three West, San Bernardino Base and Meridian, situated in Kern County, State of California, [33] and of the oil, gas, and all other property of every kind situated on said land, or already extracted therefrom and still in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property, or any part thereof from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation for them which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver is directed to collect any notes, accounts, or other



evidences of debt due or payable on account of oil and gas produced from said land and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quantity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable. [34]

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands



and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hands as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon checks signed by said Receiver and by said solicitors of record, or otherwise as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars, to be approved by this Court, shall be given by the Receiver within five days from the filing of this order; [35] provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond.

The amount of compensation to be paid to the Receiver in this suit is to be determined hereafter.

This April 23, 1915.

M. T. DOOLING,  
United States District Judge.

[Endorsed]: No. A-3—Eq. U. S. District Court,  
Southern District of California, Northern Division.  
United States of America vs. American Oilfields Co.  
et al. Order Overruling Motions to Dismiss and

Appointing Receiver. Filed Apr. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [36]

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*In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,  
Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, C. S. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman,



John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds, Charles A. Son, Anna W. Mary Waite, M. P. Waite, D. C. Wallace, Jr., A. L. Weil, and Florence G. Weil,

Defendants.

**Petition for Order Allowing Appeal.**

El Dora Oil Company, a corporation, J. L. Campbell, H. M. Jackson, John Shrader, copartners doing business under the firm name of "Ohio Valley Construction Company," and T. J. Green, defendants herein, conceiving themselves aggrieved by the order [37] given and rendered on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the above-entitled action, do hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that part of said order, a copy of which order is hereto annexed, which orders that:

"IT IS FURTHER ORDERED, that A. E. Campbell, Esq., be and he is hereby appointed Receiver of the property described in the bill of complaint herein claimed by the El Dora Oil Company, J. L. Campbell, H. M. Jackson, John Shrader, M. S. Platz, American Oilfields Company, Limited; Midland Oilfields Company, Limited, Californian Amalgamated Oil Company, Pan American Oil Company, Consolidated Midway Oil Company, National Pacific Oil Company, Maricopa Consolidated Oil Company, and A. L. Weil to wit: All the Southeast Quarter of Section Thirty-Two, township Twelve North, Range Twenty-three West, San Bernardino



Base and Meridian, situated in Kern County, State of California, and of the oil, gas, and all other property of every kind situated on said land, or already extracted from said land and still in the possession of defendants, and the defendants, and each of them, their agents, attorneys and employees are enjoined from removing said oil, gas, or other property, or any part thereof from said land, or in any manner interfering with the order of this Court, and are enjoined from further producing oil from said land, except by permission and under the direction of the said Receiver.

Said Receiver is directed to receive, and the said defendants are directed to surrender to said Receiver all moneys in their hands or in the hands of any person or corporation for them which are the proceeds of the sale of oil or gas produced from said lands hereinbefore described; and the said Receiver [38] is directed to collect any notes, accounts, or other evidences of debt due or payable on account of oil and gas produced from said lands and sold by or for said defendants, or any of them.

The said Receiver is given power and directed to operate any oil or gas well or wells on said property, or to permit them to be operated by the respective defendants now in possession of or operating same, or who have heretofore operated on said lands; or to close said wells, if he deems it necessary or advisable to do so in order to conserve the oil and gas in said lands and prevent said property from being damaged or the oil and gas from being wasted.

The said Receiver is directed to ascertain the quan-

tity of oil and gas heretofore extracted by said respective defendants, and to keep an accurate account of all oil and gas hereafter produced from said lands, and to sell said oil and gas for the best price obtainable.

For the purpose of making an investigation and determining the condition of the wells drilled on said lands, and particularly for the purpose of determining whether water is infiltrating the oil sands or reservoirs on said lands, and for the further purpose of ascertaining the amount of oil and gas heretofore produced, the price at which the same has been sold, and the value thereof, the Receiver is directed and empowered to examine the logs of the wells and the books of account kept by the defendants or any of them in the development and operation of said lands.

For the purpose of preventing damage to said lands by the infiltration of water into the oil sands and otherwise, and for the purpose of protecting and operating the said property, the said Receiver is authorized to employ such assistance and incur such expense, to be paid out of the moneys coming into his hands [39] as Receiver, as he shall deem necessary, subject to the approval of this Court. All moneys coming into the hands of said Receiver, shall, unless otherwise directed by the Court, be deposited in a bank or banks to be selected jointly by the Receiver and the defendants who claim such moneys, or their respective solicitors of record, and the solicitor for the complainant, and such moneys shall be paid out by the said bank or banks only upon



checks signed by said Receiver, and by said solicitors of record, or otherwise as may be ordered by this Court.

A bond in the sum of Five Thousand (\$5,000) Dollars, to be approved by this Court, shall be given by the Receiver within five days from the filing of this order; provided the solicitor for the complainant or for the defendants, or either of them, may at any time upon one day's notice, to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond."

And the defendants pray that this, their appeal, may be allowed; and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

Dated 25 May, 1915.

E. L. FOSTER,  
GEO. E. WHITAKER,  
Solicitors for Defendants.

[Endorsed]: No. A-3. In the District Court of the United States, for the Southern District of California. Northern Division, Ninth Circuit. The United States of America, Plaintiff, vs. American Oilfields Company, Limited, et al., Defendants. Petition for Order Allowing Appeal. Rec'd [40] copy of within May 25, 1915. Albert Schoonover, Solicitor for Plaintiff. Per M. E. Y. Filed May 25, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. L. Foster, Bakersfield, California, and Geo. E. Whitaker, Attorneys for El Dora Oil Co., et al. [41]



*In the District Court of the United States, for the  
Southern District of California, Northern Di-  
vision, Ninth Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIM-  
ITED, Midland Oilfields Company, Limited,  
El Dora Oil Company, National Pacific Oil  
Company, Miocene Oil Company, Consolidated  
Midway Oil Company, Californian Amalga-  
mated Oil Company, Pan American Oil Com-  
pany, Maricopa Consolidated Oil Company,  
General Petroleum Company, Independent  
Oil Producers Agency, Phoenix Refining and  
Manufacturing Company, Standard Oil Com-  
pany, Title Insurance and Trust Company,  
King Lumber Company, Layne and Bowler  
Company of California, Sesame Oil Company,  
Thirty Thirty-two Land Company, J. L.  
Campbell, H. M. Jackson, John Shrader,  
A. B. Coulson, M. S. Platz, J. M. Dunn,  
C. S. Green, T. J. Green, H. H. Hair, Archi-  
bald York, David S. Buchman, James Bloom,  
Daisy C. Danziger, J. M. Danziger, Edward  
Fox, Mary F. Francis, George C. Haldeman,  
John V. Hoffman, M. E. Hoffman, Benjamin  
M. Howe, Wilbert Morgrage, Mrs. W. Mor-  
grage, Robert F. O'Brien, George L. Reynolds,

Mrs. George L. Reynolds, Charles A. Son,  
Anna W. Mary Waite, M. P. Waite, D. C.  
Wallace, Jr.; A. L. Weil and Florence G.  
Weil,

Defendants.

### **Assignment of Errors.**

El Dora Oil Company, a corporation, J. L. Campbell, H. M. Jackson and John Shrader, copartners doing business under the firm name of "Ohio Valley Construction Company," and T. J. Green, defendants and appellants herein, having appealed, or being [42] about to appeal from that certain order made in the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit, on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in an action pending in said court in which the United States of America was plaintiff, and the said El Dora Oil Company, a corporation, J. L. Campbell, H. M. Jackson and John Shrader, copartners doing business under the firm name of "Ohio Valley Construction Company," and T. J. Green, and others, were defendants, by which said order a Receiver was appointed to take charge of the property of defendants, and each of them, say, that in the records and proceedings in the said court in the said action, there are manifest errors, and assigns the following as its assignment of errors upon the said appeal:

#### **I.**

That said District Court erred in making said order and appointing a Receiver.

II.

That said District Court, in making said order, erred in this, that said court had not, nor had the Judge thereof, any jurisdiction to make the said order.

III.

That said District Court erred in making said order, in this, that the said Court abused its discretion and permitted an abuse of discretion in making said order.

IV.

That said District Court erred in making said order, in that the complaint of plaintiff in said action did not show facts justifying the appointment of a Receiver.

V.

That said District Court erred in making said order, in [43] that the complaint of plaintiff in the said action fails to state any facts entitling the plaintiff herein to any equitable relief whatsoever.

VI.

That said District Court erred in making said order, in authorizing and directing the receiver to take possession of the property mentioned in said order.

VII.

That said District Court erred in making said order, in this, that defendants at that time and long prior thereto were in the actual and peaceable possession of said property claiming and holding the same under *the* by virtue of the laws of the United States, and that in and by the allegations of plain-



tiff's complaint herein, it appears that the plaintiff was and is out of possession. That it does not appear of record herein that an ancillary suit for the appointment of a receiver had ever been commenced or brought by plaintiff against defendants. That plaintiff had and has a plain, speedy and adequate remedy at law, and said District Court, sitting as a Court of Equity herein, was and is without authority or jurisdiction to make said order.

### VIII.

That the District Court erred in making the order of the 23d day of April, 1915, and entered on the 26th day of April, 1915, appointing a receiver herein, in that said Court was wholly without power and jurisdiction to give and make said order for the reasons that a final decree dismissing the bill of complaint herein was entered on the first day of June, 1914; that no motion for a rehearing, or to vacate or annul said final decree herein was entertained by said Court during the term of said court in which said final decree was given [44] and made; that during said term of said court no order was made, nor asked for from said court continuing any motion for a rehearing herein, to the succeeding term of said court; that neither during said term of said court, nor at any time thereafter, was any notice of motion for rehearing or any other motion by plaintiff herein served upon or given to the defendants herein. That no appeal from said final decree has ever been taken by the plaintiff herein.

WHEREFORE, the defendants El Dora Oil Company, a corporation, J. L. Campbell, H. M. Jackson

and John Shrader, copartners doing business under the firm name of "Ohio Valley Construction Company," and T. J. Green, pray that said order appointing a receiver herein may be directed to be expunged from the records of said District Court for want of jurisdiction in said court to give and make said order appointing a Receiver.

In order that the foregoing assignment of errors may be and appear of record, the appellants above named present the same to this Court, and pray that such disposition may be made thereof as by the law and the statutes of the United States in such case is made and provided.

E. L. FOSTER,

GEO. E. WHITAKER,

Solicitors for Defendants and Appellants El Dora Oil Company, J. L. Campbell, H. M. Jackson, and John Shrader, Copartners Doing Business Under the Firm Name of Ohio Valley Construction Company, and T. J. Green.

[Endorsed]: No. A-3—In Equity. In the District Court of the United States, Southern District of California, Northern [45] Division, Ninth Circuit. The United States of America, Plaintiff, vs. American Oilfields Company, Limited, et al., Defendants. Assignment of Errors. Rec'd Copy of Within May 25, 1915. Albert Schoonover, Solicitor for Plaintiff. Per M. E. Y. Filed May 25, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. L. Foster, Bakersfield, California. and Geo. E. Whitaker, Attorneys for Defendants Named. [46]



*In the District Court of the United States, Southern  
District of California, Northern Division.*

No. A-3—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED, Midland Oilfields Company, Limited, El Dora Oil Company, National Pacific Oil Company, Miocene Oil Company, Consolidated Midway Oil Company, Californian Amalgamated Oil Company, Pan American Oil Company, Maricopa Consolidated Oil Company, General Petroleum Company, Independent Oil Producers Agency, Phoenix Refining and Manufacturing Company, Standard Oil Company, Title Insurance and Trust Company, King Lumber Company, Layne and Bowler Company of California, Sesame Oil Company, Thirty Thirty-two Land Company, J. L. Campbell, H. M. Jackson, John Shrader, A. B. Coulson, M. S. Platz, J. M. Dunn, S. C. Green, T. J. Green, H. H. Hair, Archibald York, David S. Bachman, James Bloom, Daisy C. Danziger, J. M. Danziger, Edward Fox, Mary F. Francis, George C. Haldeman, John V. Hoffman, M. E. Hoffman, Benjamin M. Howe, Wilbert Morgrage, Mrs. W. Morgrage, Robert F. O'Brien, George L. Reynolds,



Mrs. George L. Reynolds, Charles A. Son,  
Anna W. Mary Waite, M. P. Waite, D. C.  
Wallace, Jr.; A. L. Weil and Florence G.  
Weil,

Defendants.

**Order Allowing Appeal and Fixing Bond.**

On motion of E. L. Foster, Esq., and George E. Whitaker, Esq., solicitors for the defendants, the El Dora Oil Company, a Corporation, J. L. Campbell, H. M. Jackson, John Shrader, copartners, doing business under the firm name of "Ohio Valley Construction Company" and T. J. Green, and on filing the Petition of said defendants for an Order Allowing an Appeal, together with an assignment of Errors, it is ordered that an appeal be, and is hereby, allowed to the United States Circuit Court [47] of Appeals for the Ninth Circuit, from the order given and made herein on the 23d day of April, 1915, and filed on the 26th day of April, 1915, in the District Court of the United States for the Southern District of California, Northern Division, appointing a Receiver to take charge of the property of defendants and each of them, and that a certified transcript of such parts of the record, testimony, exhibits and all proceedings herein as are specified as material, be forthwith transmitted to said United States Circuit Court of Appeals, for the Ninth Circuit. It is further ordered that the Bond on Appeal be fixed at \$500.00, to be approved by the Court.

BLEDSON,

Judge.

Los Angeles, California, June 11th, 1915.

[Endorsed]: No. A-3—Equity. United States District Court, Southern District of California, Northern Division. The United States of America, Plaintiff, vs. American Oilfields Company, Limited, et al., Defendants. Order Allowing Appeal and Fixing Bond. Filed Jun. 11, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.  
[48]

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*In the District Court of the United States, for the  
Southern District of California, Northern Di-  
vision, Ninth Circuit.*

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

AMERICAN OILFIELDS COMPANY, LIMITED,  
et al.,

Defendants,

EL DORA OIL COMPANY, J. L. CAMPBELL,  
H. M. JACKSON and JOHN SHRADER,  
Doing Business Under the Firm Name of  
OHIO VALLEY CONSTRUCTION COM-  
PANY, and JOHN SHRADER, and T. J.  
GREEN,

Defendants and Appellants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, George A. Long, and G. A. Lathrop, both  
of the County of Los Angeles, State of California,



are held and firmly bound unto the above-named respondent, the United States of America, in the sum of Five Hundred Dollars (\$500.00), to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 16th day of June, in the year of our Lord 1915.

WHEREAS, the above-named El Dora Oil Company, J. L. Campbell, H. M. Jackson and John Shrader, doing business under the firm name of Ohio Valley Construction Company, and John [49] Shrader and T. J. Green have prosecuted an appeal to the United States Circuit Court of Appeals, Ninth Circuit of United States, to reverse the decree rendered in the above-entitled suit, appointing a Receiver, by the Judge of the District Court of the United States, in and for the Southern District of California, Northern Division, by the Hon. M. T. Dooling, Judge thereof;

NOW, THEREFORE, the condition of this obligation is such that if the above-named El Dora Oil Company, J. L. Campbell, H. M. Jackson and John Shrader, doing business under the firm name of Ohio Valley Construction Company, and John Shrader, and T. J. Green shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and



remain in full force and virtue.

GEORGE A. LONG. [L. S.]

G. A. LATHROP. [L. S.]

Signed, sealed and delivered, and taken and acknowledged before me, this 16th day of June, 1915.

CHAS. N. WILLIAMS,

United States Commissioner. [50]

State of California,

County of Los Angeles,—ss.

George A. Long and G. A. Lathrop, being sworn, each for himself, says: That he is one of the sureties named in the above undertaking; that he is a resident and householder within the State of California, and that he is worth the sum in the said undertaking specified over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEORGE A. LONG.

G. A. LATHROP.

Subscribed and sworn to before me this 16th day of June, 1915.

[Seal]

WM. M. VAN DYKE,

Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,  
Deputy.

Approved this 16 day of June, 1915.

BLEDSON, Ju.,

United States District Judge.

[Endorsed]: No. A-3—In Equity. The United States of America vs. American Oilfields Company, Limited, et al., Defendants, El Dora Oil Company

et al., Defendants and Appellants. Bond on Appeal. Filed Jun. 16, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Davis, Kemp & Post, Attorneys. Removed to 812 Marsh-Strong Bldg. Suite 315 Grant Bldg. Tels. Home A-5037, Main 5146. Los Angeles, Cal. [51]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern  
District of California.*

CLERK'S OFFICE.

No. A-3—IN EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN OILFIELDS COMPANY, LIM-  
ITED; MIDLAND OILFIELDS CO., LIM-  
ITED, et al.,

Defendants.

**Praecipe [for Transcript of Record].**

To the Clerk of Said Court:

Sir: Please issue and prepare for the Transcript on Appeal to the Circuit Court of Appeals, the Bill of Complaint; Motions to Dismiss the Bill of Complaint, made by these defendants; Order Overruling Motions to Dismiss and Appointing Receiver; Petition for Order Allowing Appeal; Assignment of Errors; Order Allowing Appeal and Fixing Bond; Bond on Appeal; Citation on Appeal; and such other and further documents and relation to the same as are on file; and that the same be sent up to the Cir-

cuit Court of Appeals, and that the same may be printed as these defendants' Transcript.

GEO. E. WHITAKER,

E. L. FOSTER,

Attorneys for El Dora Oil Company, a [52] corporation; J. L. Campbell, H. M. Jackson and John Shrader, copartners doing business under the firm name of Ohio Valley Construction Company, and T. J. Green.

[Endorsed]: No. A—3—In Equity. U. S. District Court, Southern District of California. The United States of America, Plaintiff, vs. American Oilfields, Limited, et al., Defendants. Praeceptum for ——— Filed Jun. 25, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [53]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, in and  
for the Southern District of California, Northern  
Division.*

No. A-3—EQUITY.

THE UNITED STATES OF AMERICA,

Plaintiff,

versus

AMERICAN OILFIELDS COMPANY, LIMITED,  
Midland Oilfields Company, Limited, El Dora  
Oil Company, National Pacific Oil Company,  
Miocene Oil Company, Consolidated Midway  
Oil Company, Californian Amalgamated Oil



Company, Pan American Oil Company, Mari-  
copa Consolidated Oil Company, General Pe-  
troleum Company, Independent Oil Producers  
Agency, Phoenix Refining and Manufacturing  
Company, Standard Oil Company, Title Insur-  
ance and Trust Company, King Lumber Com-  
pany, Layne and Bowler Company of Cali-  
fornia, Sesame Oil Company, Thirty Thirty-  
two Land Company, J. L. Campbell,  
H. M. Jackson, John Shrader, A. B. Coulson,  
M. S. Platz, J. M. Dunn, C. S. Green, T. J.  
Green, H. H. Hair, Archibald York, David S.  
Bachman, James Bloom, Daisy C. Danziger,  
J. M. Danziger, Edward Fox, Mary F. Fran-  
cis, George C. Haldeman, John V. Hoffman,  
M. E. Hoffman, Benjamin M. Howe, Wilbert  
Morgrage, Mrs. W. Morgrage, Robert F.  
O'Brien, George L. Reynolds, Mrs. George L.  
Reynolds, Charles A. Son, Anna W. Mary  
Waite, M. P. Waite, D. C. Wallace, Jr., A. L.  
Weil and Florence G. Weil,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of  
the United States of America, in and for the South-  
ern District of California, do hereby certify the fore-  
going fifty-three (53) typewritten pages, numbered  
from 1 to 53, inclusive, and comprised in one (1)  
volume, to be a full, true and correct [54] copy  
of the Bill of Complaint, Motion of Defendants, El  
Dora Oil Company et al., to Dismiss Bill of Com-  
plaint, Order Overruling Motions to Dismiss and Ap-  
pointing Receiver, Petition for Order Allowing

Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Bond, Bond on Appeal and Praecipe for Transcript in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the defendants and appellants, El Dora Oil Company, et al., by their attorney of record.

I do further certify that the cost of the foregoing record is \$28.00, the amount whereof has been paid me by the El Dora Oil Company, a Corporation, J. L. Campbell, H. M. Jackson and John Shrader, co-partners doing business under the firm name of Ohio Valley Construction Company and T. J. Green, the appellants in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 9th day of September, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,

Deputy Clerk. [55]

[Ten Cent Internal Revenue Stamp. Canceled  
9/9/15. L. S. C.]

[Endorsed]: No. 2660. United States Circuit Court of Appeals for the Ninth Circuit. El Dora Oil Company, J. L. Campbell, H. M. Jackson, and John Shrader, Doing Business Under the Firm Name of Ohio Valley Construction Company, and John Shrader and T. J. Green, Appellants, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Received September 10, 1915.

F. D. MONCKTON,  
Clerk.

Filed September 22, 1915,

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



**[Order Extending Time to File Transcript of Record  
on Appeal, etc.]**

*In the United States Circuit Court of Appeals, Ninth  
Judicial District.*

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

vs.

EL DORA OIL COMPANY, J. L. CAMPBELL, H.  
M. JACKSON and JOHN SHRADER, Doing  
Business Under the Firm Name of OHIO  
VALLEY CONSTRUCTION COMPANY,  
and JOHN SHRADER and T. J. GREEN,  
Defendants and Appellants.

Good cause appearing therefor, it is hereby ordered that the appellants El Dora Oil Company, J. L. Campbell, H. M. Jackson and John Shrader, doing business under the firm name of Ohio Valley Construction Company, and John Shrader and T. J. Green have sixty (60) days additional and further time within which to file their transcript on appeal in the above-entitled suit, with the Clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated at Los Angeles, June 17, 1915.

BLEDSON, J.,

United States District Judge.

[Endorsed]: No. 2660. United States Circuit Court of Appeals for the Ninth Circuit. United States of America vs. El Dora Oil Company et al. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 22, 1915. F. D. Monckton, Clerk.

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No. 2660.

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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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El Dora Oil Company, J. L. Campbell, H. M. Jackson and John Shrader, doing business under the firm name of Ohio Valley Construction Company, and John Shrader and T. J. Green,  
*Appellants,*

*vs.*

The United States of America,  
*Appellee.*

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BRIEF FOR APPELLANTS.

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GEO. E. WHITAKER,  
E. L. FOSTER,  
*Attorneys for Appellants.*





**No. 2660.**

**IN THE**

**United States**

# **Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT.**

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**El Dora Oil Company, J. L. Campbell, H. M. Jackson and John Shrader, doing business under the firm name of Ohio Valley Construction Company, and John Shrader and T. J. Green,**  
*Appellants,*

*vs.*

**The United States of America,**  
*Appellee.*

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## **BRIEF FOR APPELLANTS.**

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### **STATEMENT OF THE CASE.**

This is an action in equity in the form of a bill of complaint brought by the appellee against various defendants, including the appellants, and the bill of complaint is set forth on pages 5 to 30 of the Transcript of Record.

The bill of complaint sets out, in paragraph II, that the plaintiff and appellee "is the owner and entitled to

the immediate and exclusive possession and enjoyment of all the lands next hereinafter described, and of all mineral oil, petroleum, gas and other minerals therein contained. \* \* \* All of said land at all said times has been, and now is, a part of the public domain of the United States, except as withdrawn and reserved from entry as hereinafter alleged.” [Tr. p. 10.]

In paragraph III it is alleged that the Secretary of the Interior reserved and withdrew the said land on certain dates, and that the President of the United States, on the dates alleged, also withdrew said land from all forms of location, settlement, selection, filing, entry or disposal under the mineral and non-mineral public land laws of the United States. In the same paragraph [Tr. p. 11] it is further alleged that notwithstanding the withdrawals, the defendants and appellants, subsequent to January 1st, 1910, entered upon the land and pretended to acquire, and now assert mineral rights therein, and had committed, and are now committing, trespass and waste thereupon.

In paragraph IV [Tr. p. 12] it is alleged that the appellant, El Dora Oil Company, subsequent to July 4, 1910, entered upon said land, and drilled an oil well or oil wells, and still is operating said wells, and extracting from said land and appropriated to its own use, large quantities of petroleum.

It is next alleged, on pages 13, 14 and 15, that the El Dora Oil Company, one of the appellants, claims under certain pretended notices of mining location. It is to be noted that one of these notices of mining location is dated January 1st, 1907.

In paragraph V it is alleged that no discovery of petroleum upon any part of the land described was made prior to October 10th, 1910. It is to be noted in said paragraph referred to, that it alleges as follows:

“Prior to January 1, 1910, no person or association or corporation was a *bona fide* occupant or claimant of any part of said land, engaged in the diligent or other prosecution of work leading to the discovery of oil or gas, or any other mineral.”

It is further alleged, in paragraph VII [Tr. p. 18], that the defendants, unless restrained, will continue to operate the aforesaid oil wells and extract oil and drill other oil wells, and otherwise commit trespass and waste, to the great and irreparable injury of the plaintiff.

It is then further alleged in paragraph XI [Tr. p. 23] that defendants have no right, title or interest in and to said land, and that the mining locations are void.

Then, in the prayer of said bill of complaint, in paragraph VI [Tr. p. 26], it is asked, in part:

“that a receiver may be appointed by this court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, storage, transportation, etc., of petroleum or petroleum products, or other minerals. \* \* \*”



Thereafter, a motion to dismiss was made by the appellants [Tr. pp. 31-32] and thereafter an order was made overruling the motion to dismiss, and appointing a receiver. [Tr. pp. 33-37.] It is set forth in said order appointing a receiver that A. E. Campbell be, and he is hereby appointed receiver of the property described in the bill of complaint, claimed by appellants El Dora Oil Company, Campbell, Jackson and Shrader, upon the land described, and “of the oil, gas, and *all other property of every kind situated on said land.*” And again, on page 36, the order recites that “the said receiver is given power and directed to operate any oil or gas well or wells on said property,” together with the other matters therein set forth.

Thereafter, a petition for an order allowing appeal was made [Tr. pp. 39-42] setting forth in part the order appointing a receiver, and assigns of error were made.

The appellants rely upon the following:

### **ASSIGNMENT OF ERRORS.**

#### **I.**

That said District Court erred in making said order and appointing a receiver.

#### **II.**

That said District Court, in making said order, erred in this, that said court had not, nor had the judge thereof, any jurisdiction to make the said order.

III.

That said District Court erred in making said order in this, that the said court abused its discretion and permitted an abuse of discretion in making said order.

IV.

That said District Court erred in making said order, in that the complaint of plaintiff in said action did not show facts justifying the appointment of a receiver.

V.

That said District Court erred in making said order, in that the complaint of plaintiff in the said action fails to state any facts entitling the plaintiff herein to any equitable relief whatsoever.

VI.

That said District Court erred in making said order, in authorizing and directing the receiver to take possession of the property mentioned in said order.

VII.

That said District Court erred in making said order in this, that defendants at that time and long prior thereto were in the actual and peaceable possession of said property, claiming and holding the same under and by virtue of the laws of the United States, and that in and by the allegations of plaintiff's complaint herein, it appears that the plaintiff was and is out of possession. That it does not appear of record herein that an ancillary suit for the appointment of a receiver had

ever been commenced or brought by plaintiff against defendants. That plaintiff had and has a plain, speedy and adequate remedy at law, and said District Court, sitting as a court of equity herein, was and is without authority or jurisdiction to make said order.

### VIII.

That the District Court erred in making the order of the 23d day of April, 1915, and entered on the 26th day of April, 1915, appointing a receiver herein, in that said court was wholly without power and jurisdiction to give and make said order for the reasons that a final decree dismissing the bill of complaint herein was entered on the first day of June, 1914; that no motion for a rehearing, or to vacate or annul said final decree herein was entertained by said court during the term of said court in which said final decree was given and made; that during said term of said court no order was made, nor asked for from said court continuing any motion for a rehearing herein, to the succeeding term of said court; that neither during said term of said court, nor at any time thereafter, was any notice of motion for rehearing or any other motion by plaintiff herein served upon or given to the defendants herein. That no appeal from said final decree has ever been taken by the plaintiff herein.



## ARGUMENT.

### I.

As disclosed by the bill of complaint, the only property that the appellee claims to own was the land described in paragraph II [Tr. p. 9], and there is no allegation in the bill of complaint stating that the personal property set out in the prayer of said bill of complaint, in paragraph 6 [Tr. p. 26], belongs to the appellee. The order appointing the receiver authorizes the receiver to take possession of all of the property of every kind situated on said land, and there is no allegation that the appellee is the owner of the personal property upon said land.

“But a court cannot appoint a receiver to take charge of property which is not involved in the litigation, or to take charge of all of a debtor’s property, including that which is not, as well as that which is, specially bound for the payment of the claim in suit.”

34 Cyc. 44, note 45 therein.

This note cites a large number of cases in the different states, together with several United States cases, to-wit:

Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637, and other cases.

Again, in the same note, it says:

“The property must be the direct subject of the action, and the judgment, to be granted, must act upon the specific property.”

Johnson v. Cochran, 36 N. Y. Supp. 287.

Therefore, the court could not appoint a receiver to take charge of, or possession of, all other property of every kind situated on said land, and particularly referred to in paragraph VI of the prayer, and also referred to in the order appointing the receiver. [Tr. p. 35.] For, it is not alleged in the bill of complaint, in any paragraph, that the plaintiff and appellee is the owner of the personal property, or any other property except the particularly described real estate, to-wit: The southeast quarter ( $SE\frac{1}{4}$ ) of section thirty-two (32), township twelve (12) north, range twenty-three west, S. B. M., Kern county, state of California. [Tr. p. 9.]

It not being alleged that the plaintiff and appellee was the owner of and entitled to the possession of the personal property, the court was without jurisdiction to make the order appointing a receiver, as set forth herein. It is so well settled that there must be an allegation on the part of the complainant that he is entitled to certain property in order to give the court jurisdiction to appoint a receiver therefor, that the citation of authorities on this point would seem to be unnecessary.

## II.

Laches and acquiescence of appellee is a bar to the appointment of a receiver. It is to be noted that it is alleged in the bill of complaint [Tr. p. 16] that on October 10, 1910, petroleum and other minerals were discovered, and it is further alleged that these appellants, subsequent to July 4th, 1910, have been in the

said possession of said land, and have drilled oil wells thereon, and have extracted oil therefrom. [Tr. pp. 12-13.] The bill of complaint was filed February 27th, 1913. [Tr. p. 5.] A period of two years, seven and one-half months. There is no allegation or reason set out in said bill of complaint that the said appellee did not know of the act or acts of said appellants until a short time before the filing of this bill of complaint. There is no allegation that the appellee served any notice or gave the appellants any demand for the possession of the said premises.

The appellee stood idly by and permitted these appellants to drill oil wells thereon, under the allegations set out in said bill of complaint.

As was said in *High on Receivers*, 4th Edition, 1910, paragraph 14:

“So an application for a receiver is not entitled to favorable consideration, when the plaintiff has lain by for a long period of years and quietly acquiesced in a condition of affairs which he seeks to change by obtaining a receiver. For example, where plaintiffs seek the aid of a receiver over property in which they claim some interest, but which has been in the possession of defendants for a long period of years, during all of which time plaintiffs and those under whom they claim have acquiesced in such possession, equity will not interfere by a receiver *in limine*.”

And again in the same paragraph, it says in effect that where the application is based upon alleged mis-



conduct of the trustees and his misappropriation of funds, but it is shown that the state of affairs complained of has existed for very many years with plaintiff's knowledge, and without objection on their part, the court will not take the property from defendant's hands and place it in the custody of a receiver.

Again, in paragraph 593 of *High on Receivers*, same edition, the plaintiff seeking the aid of a receiver over real property, that it is intended that he should use due diligence in the assertion of his rights, since long acquiescence in defendant's position may suffice to bar him from the relief asked for, and as it is further said:

“When a shareholder in a corporation seeks a receiver over real property held by defendant, alleging it to be the property of a corporation, but plaintiff has acquiesced in defendant's possession and use of the property for a number of years without question or remonstrance and shows no danger on the ground of defendant's responsibility, he will not be allowed a receiver.”

To the same effect:

34 Cyc. 44.

### III.

There is no allegation of the insolvency of appellants, but there is an allegation that these defendants claim under a pretended legal title.

As stated in the heading, there is no allegation in the bill of complaint that the appellants are insolvent, or unable to respond in damages. There is an allegation that the appellants are in possession and are re-

ceiving the profits of said land under the claim of legal title, to-wit, the location notices, as set forth.

Consequently, the court erred in making said order appointing a receiver.

“And whenever the contest is simply a question of disputed title to the property, plaintiff asserting a legal title in himself, against a defendant in possession, and receiving rents and profits *under claim of legal title*, equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary forms of procedure at law. \* \* \* Nor will defendant be deprived of his possession by a receiver, unless it is made to appear that there is great risk of ultimate loss to the property, and of insolvency on the part of defendant, so that he will be unable to respond to a final decree.”

Section 557 High on Receivers, 4th Edition,  
1910.

In relation to appointing receivers over mines, it has been held in the case of a mortgage upon the property that it was necessary that it be alleged in the complaint that the mortgagor is insolvent, and that the mining claim will be worked out.

Section 614 High on Receivers;  
Hill v. Taylor, 22 Cal. 191.

It is also held that in the case of a colliery or mine that a receiver will not be appointed when it is not alleged that the defendants in possession are insolvent, or that they are unable to account for the mesne

profits, or that the property is being injured under their management.

Section 615 High on Receivers.

#### IV.

There is no allegation in the bill showing the facts constituting the irreparable injury and the insolvency of the appellants, where it is alleged that the appellants claim some legal title.

In this connection, it is not the policy of the courts to take charge of real property where the defendant is in possession and is asserting a legal title to the property.

34 Cyc. 51.

It is beyond argument, almost, that the mining laws of the United States permit persons to take up mining claims, and, having performed the requirements of the mining laws, that the locators or persons deriving title therefrom are entitled to hold the possession as against everyone, and in effect have the legal title for that purpose.

It must appear in a mining case, or in a suit affecting the appointment of a receiver affecting mines, that the parties in possession are insolvent, and the same rule applies to oil wells.

Cases cited under note 71, 34 Cyc. 51, and particularly citing:

Hickey v. Parrot Silver etc., 25 Mont. 164, 64 Pac. 230, and other cases.



Specification VIII is borne out by the record on appeal and the records, files and papers in said cause, and therefore the court had no jurisdiction, without proceeding in the manner set forth in assignment No. VIII, without entertaining a motion for a rehearing or to vacate or annul the final decree, and without notice served upon these appellants.

Wherefore, it is respectfully submitted that the order appealed from should be reversed and set aside.

Respectfully submitted,

GEO. E. WHITAKER,

E. L. FOSTER,

*Attorneys for Appellants.*



# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

EL DORA OIL COMPANY, J. L.  
CAMPBELL, H. M. JACKSON and  
JOHN SHRADER, Doing Business  
Under the Firm Name of OHIO  
VALLEY CONSTRUCTION COM-  
PANY, and JOHN SHRADER and  
T. J. GREEN,

*Appellants,*

VS.

THE UNITED STATES OF AMER-  
ICA,

*Appellee.*

**Appeal From the United States District  
Court For the Southern District of  
California, Northern Division.**

**BRIEF ON BEHALF OF THE APPELLEE.**

Filed  
JUN 8 1917





No. 2660

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

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CAMPBELL, H. M. JACKSON and  
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*Appellants,*

vs.

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*Appellee.*

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**Appeal From the United States District Court  
For the Southern District of California.**

---

**BRIEF ON BEHALF OF THE APPELLEE.**

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## FACTS.

This was a suit brought by the United States to recover land described in the bill of complaint, to-wit:

All of the Southeast Quarter of Section 32, Township 12 North, Range 23 West, San Bernardino base and meridian, situated in Kern County, State of California, and to restrain numerous persons from trespassing on said land; to prevent the withdrawal of oil and gas therefrom; to prevent waste and damage to said land, and to conserve it for the purposes of the United States.

The bill of complaint, being duly verified, was used as an affidavit as a basis for motions for an injunction and the appointment of a receiver.

Numerous defendants, including the appellants, without filing answers or affidavits, appeared at the time the motions were argued and interposed a motion to dismiss, as appears on page 31 of the printed record. The grounds of the motion of appellants to dismiss were as follows:

“\* \* \* for insufficiency of facts to constitute a valid cause of action in equity against these defendants.

“That it appears from said Bill of Complaint that the defendants entered upon the land described therein prior to the 1st day of April, 1910, and continued drilling a well thereon for the purpose of discovery of oil;

“That defendants, from the 1st day of April, 1910, were continuing in diligent prosecution of work in good faith leading to discovery of oil on said land until or about October, 1910, when oil was discovered thereon in paying quantities;



“That defendants were in diligent prosecution of work in good faith leading to discovery of oil, on the 2d day of July, 1910, claiming under Mineral Locations made prior to the 6th day of March, 1910;

“That the basis of plaintiff’s cause of action depends on an alleged withdrawal of said lands, described in plaintiff’s Bill of Complaint, on the 27th day of September, 1909, by the Honorable, the Secretary of the Interior of the United States, and that the said alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void, and of no force and effect, and beyond the authority of the Secretary of the Department of the United States, and contrary to the provisions of Chapter VI of Title 32 of the Revised Statutes of the United States, and the ‘Act of Congress of February 11, 1897, at L. 526, and the Acts Amendatory thereof and Supplemental thereto.

“That it further appears that no withdrawal of mineral *is* (in) said land has been made.”

The motion of the defendants to dismiss was overruled, and the District Judge on April 23, 1915, appointed a receiver. The appeal in this case is from that order appointing a receiver, and is under the provisions of Section 129 of the Judicial Code. The defendants in their motion to dismiss, which is quoted above, purported to recite the facts as alleged in the bill of complaint, but they do not do so. A sufficient statement of the allegations in the bill are herein summarized.

It is alleged the defendants, J. L. Campbell, H. M. Jackson, and John Shrader, now are, and at all the

times mentioned in the bill as to them were, co-partners doing business under the firm name of "Ohio Valley Construction Company." (R. 8.)

The defendant, El Dora Oil Company was, at all times mentioned as to it, a corporation. (R. 7 and 8.)

The necessary and proper jurisdictional facts are alleged.

The plaintiff now is, and ever since the Treaty of Guadalupe Hidalgo has been, the owner and entitled to the immediate and exclusive possession and enjoyment of all the land described, and of all petroleum, gas and other minerals therein contained. All of said land has been at all times, and now is a part of the public domain of the United States, except as withdrawn and reserved from entry, as alleged, and all of said land has at all times been oil-bearing land, containing rich deposits of petroleum and gas in paying quantities, and has at all times been chiefly valuable for petroleum and gas deposited therein, and has never contained minerals other than petroleum and gas. (R. 9-10.)

On the 14th day of September, 1908, the land was withdrawn by the Secretary of the Interior from settlement, entry and purchase under the non-mineral land laws of the United States. (R. 10.)

On June 9, 1909, the land was duly classified by

the Secretary of the Interior as oil-bearing land. (R. 10.)

On September 27, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him, duly and regularly withdrew and reserved said land (together with other contiguous public lands) from mineral exploration, and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws of the United States; and since said last named date none of said land has been subject to exploration for minerals or to the initiation of any right under any of the public land laws of the United States. (R. 10-11.)

On July 2, 1910, the President of the United States, under the authority legally invested in him, and especially by virtue of the provisions of the Act of Congress of June 25, 1910, entitled "An Act to Authorize the President of the United States to Make Withdrawal of Public Lands in Certain Cases." (36 Stat. 847), duly and regularly ratified, affirmed and continued in full force and effect said order of withdrawal and reservation of September 27, 1909, and further withdrew and reserved said land from all forms of location, settlement, selection, filing, entry or disposal, under the mineral or non-mineral public land laws of the United States, subject only to the provisions of said Act of Congress, and each of said orders of withdrawal and



reservation; and each of said orders of withdrawal and reservation have since been, and are now in full force and effect. (R. 11.)

The defendants (subsequent to January 1, 1910, entered upon the land and pretended to acquire and assert mineral rights therein, or to some part thereof, and have committed, and are now committing trespass and waste thereupon. (R. 11-12.)

The Midway Oil Company wrongfully and unlawfully and in violation of the proprietary and other rights of the United States, entered on the land and thereafter drilled and caused to be drilled an oil well, and extracted from the land and appropriated to its use large quantities of petroleum and gas. (R. 12.)

Subsequent to July 4, 1910, the defendant El Dora Oil Company, and other defendants, entered on said land and thereafter drilled oil wells and extracted from the land and appropriated to their use large quantities of petroleum and gas. (R. 13.)

It is also alleged that subsequent to July 5, 1910, several of the other defendants so trespassed upon said land and took oil and gas and appropriated it to their own use.

It is alleged that pretended notices of mining locations were made and posted on said land and recorded in the office of the Recorder of Kern

County, California, by different groups of locators on the dates respectively:

January, 1907; February, 1910; July, 1910; October 7, 1910; October 18, 1910. (R. 14-15.)

No work of exploration or development for the discovery of petroleum, mineral oil or gas, or any other mineral was ever commenced or prosecuted, in good faith, or otherwise, or at all, upon any part of said land under either or any of said placer mining claims or otherwise by or on behalf of said pretended locators or either or any of them, or any of their alleged successors in interest, or any of the defendants herein, or otherwise, or at all, prior to July 4, 1910. No discovery of any minerals other than petroleum or gas has ever been made on said land; and petroleum or gas was not discovered on said land prior to October 10, 1910. (R. 16.)

Prior to January 1, 1910, no person, or association, or corporation was a bona fide occupant or claimant of any of said land engaged in the diligent or other prosecution of work leading to the discovery of oil or gas, or any other minerals. (R. 17.)

Certain of the defendants, including the defendants Campbell, Jackson and Shrader, appropriated oil from said land to their own use; the quantity of oil so appropriated is not known, and a full discovery in the premises is sought. (R. 17 and 18.)

Certain of the defendants threaten, and unless restrained will continue to operate the oil wells and extract from said land petroleum and gas. (R. 18.)

The bill the complainant seeks discovery of all matters and things stated therein, a full disclosure of the claims of the defendants and each of them; and for a decree declaring that from and after the 27th day of September, 1909, the land was lawfully withdrawn from all forms of settlement, selection, filing, entry or disposal under the mineral and non-mineral land laws of the United States; that the defendants and each of them be decreed to have no estate, right or title, interest or claim in said land or any minerals deposited therein; and that all of the defendants be enjoined from asserting claim thereto, and from going on said land, and from in any manner extracting, removing or using any mineral therein, and committing trespass or waste on said land, and of the minerals deposited therein, and that an accounting may be had by each of the defendants of the minerals taken from said land, and for the recovery of damages sustained by the plaintiff in the premises; and that a receiver may be appointed to take possession of the land and of the wells, derricks, etc. which have been used in extracting, storing, etc. petroleum or gas on said land, and that the receiver have power to continue to operate the said wells for the preservation and protection of the property, and for such other and further relief as in equity may seem just and proper. (R. 24-28.)

The assignment of errors (R. 44-47) seeks to raise



substantially the same questions as defendants sought to raise by the motion to dismiss, which is quoted above. (R. 31-32.)

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### ARGUMENT.

The eighth assignment of error (R. 46) has no basis in fact, and was probably set out by counsel for appellants by inadvertence and mistake. It is recited in that assignment of error "that a final decree dismissing the bill of complaint herein was entered on the first day of June, 1914." There was no final decree ever entered dismissing the bill of complaint in this suit. The other statements in the eighth assignment of error are predicated upon the erroneous idea that such final decree dismissing the bill of complaint herein was entered. The other assignments of error, seven in number (R. 44-5-6) are more vague and indefinite as to the alleged errors complained of by appellants than was the motion to dismiss. (R. 31 and 32.)

As the brief of the appellants has not been filed, and probably will not be filed in time for counsel for appellee to see it before preparing the brief of the appellee, it is necessary to anticipate the points which the appellants will discuss in their brief and arguments. This can be done with reasonable confidence, however, as the case was fully argued in the District Court.

The appellants, in the motion made by them in the

District Court to dismiss, stated "that the defendants were in diligent prosecution of work, in good faith, leading to the discovery of oil on July 2, 1910, claiming under mineral locations made prior to the 6th day of March, 1910." While this statement does not in all respects accord with the facts alleged, it is, nevertheless, submitted that if it be true, such state of facts will avail appellants nothing. Whether the case is decided upon the allegation that the defendants entered upon the land and began to operate for oil after the 2nd day of July, 1910, or upon the facts as contended by the defendants, that they entered prior to the 2nd day of July, 1910, under a location notice made prior to the 6th day of March, 1910, the results, it is submitted, will be the same.

The appellants in their motion to dismiss say:

" \* \* \* the basis of plaintiff's cause of action depends on an alleged withdrawal of said lands, described in plaintiff's Bill of Complaint, on the 27th day of September, 1909, by the Honorable, the Secretary of the Interior of the United States, and that the said alleged withdrawal of said land from entry on the 27th day of September, 1909, was unconstitutional, void and of no force and effect, and beyond the authority of the Secretary."

THE CASE OF THE UNITED STATES v.  
MIDWEST OIL COMPANY, 236 U. S. 459.

The Supreme Court of the United States in an opinion delivered by Mr. Justice Lamar, in the Midwest case, goes fully into the reasons which in-

duced the President to make the order of withdrawal of 27th of September, 1909, and fully sustains and upholds his power in so doing.

The following quotations are made from that decision :

“Large areas in California were explored; and petroleum having been found, locations were made, not only by the discoverer, but by others on adjoining land. And as the flow through the well on one lot might exhaust the oil under the adjacent land, the interest of each operator was to extract the oil as soon as possible so as to share what would otherwise be taken by the owners of nearby wells.

“The result was that oil was so rapidly extracted that on Sept. 17, 1909, the Director of the Geological Survey made a report to the Secretary of the Interior which, with enclosures, called attention to the fact that, while there was a limited supply of coal on the Pacific Coast and the value of oil as a fuel had been fully demonstrated, yet at the rate at which oil lands in California were being patented by private parties it would ‘be impossible for the people of the United States to continue ownership of oil lands for more than a few months. After that the Government will be obliged to repurchase the very oil that it has practically given away \* \* \*.’ ‘In view of the increasing use of fuel by the American Navy there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government’s own use \* \* \*’ and ‘pending the enactment of adequate legislation on this subject, the filing of claims to oil lands in the State of California should be suspended.’



“This recommendation was approved by the Secretary of the Interior. Shortly afterwards he brought the matter to the attention of the President, who, on September 27, 1909, issued the following Proclamation:

“ ‘Temporary Petroleum Withdrawal No. 5.’

“ ‘In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation and examination.’ ”

See pages 1 and 2 of opinion.

The authority of the President to make the order of withdrawal was fully sustained by the Court in the opinion wherein it is said:

“The case has twice been fully argued. Both parties, as well as other persons interested in oil lands similarly affected, have submitted lengthy and elaborate briefs on the single and controlling question as to the validity of the Withdrawal order. \* \* \*

“We need not consider whether as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of legal consequences flowing from a long continued practice to make orders like the one here involved. For the President’s proclamation of September 27, 1909,

is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that the 'practice dates from an early period in the history of the government.' *Grisar v. McDowell*, 6 Wall, 381. See also pages 46 et seq. of this brief, which show extent of damage being done by water and otherwise."

### THE MIDWEST CASE IS NOT DISTINGUISHABLE FROM THE CASE BEFORE THIS COURT.

Counsel for the appellants insisted in the court below that this case is distinguishable from the Midwest case, in as much as the location notices were posted on the land and filed prior to the order of withdrawal of September 27, 1909, and that it was not sufficiently alleged that assessment work was not done under such location notices during the years previous to 1909. They refer to the recital of facts on page 2 of the opinion in the Midwest case as follows:

"On March 27, 1910, six months after the publication of the Proclamation, William T. Henshaw and others entered upon a quarter section of this public land in Wyoming so withdrawn. They made explorations, bored a well, discovered oil and thereafter assigned their interest to the appellees, who took possession and extracted large quantities of oil. On May, 1910, they filed a location certificate."

A careful reading of the opinion in the Midwest case will show that no such distinction can be made. The following are quotations from the opinion of the Supreme Court of the United States in that case:

“Nor is the position of the appellees strengthened by the Act of June 25, 1910 (36 Stat. 847), to authorize the President to make withdrawals of public lands and requiring a list of the same to be filed with Congress.

“It was passed after the President’s Proclamation of September 27, 1909, and months after the occupation and attempted location by virtue of which the appellees claim to have acquired a right to the land. This statute expressly provided that it should not ‘be construed as a recognition, abridgment or enlargement of any asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of this Act.’

“True, as argued, the Act provides that it shall not be construed as an ‘*abridgment*’ of asserted rights initiated in oil lands after they had been withdrawn.’ But it likewise provides that it shall not be considered as a ‘recognition of such rights.’ There is however, nothing said indicating the slightest intent to repudiate the withdrawals already made.

“The legislative history of the statute shows that there was no such intent and no purpose to make the Act retroactive or to disaffirm what the agent in charge had already done. The proclamation of September 27, 1909, withdraw-



ing oil lands from private acquisition was of far-reaching consequence both to individuals and to the public. It gave rise to much discussion and the old question as to the authority of the President to make these orders was again raised.

“In other words, if, notwithstanding the withdrawal, any locator had initiated a right which, however, had not been perfected, Congress did not undertake to take away his rights. On the other hand, if the withdrawal order had been legally made under the existing power, it needed no ratification and if a location made after the withdrawal gave the appellees no right, Congress, by this statute, did not legislate against the public and validate what was then an invalid location.”

#### DISCOVERY OF MINERALS IS REQUIRED BEFORE THERE CAN BE A LOCATION OF MINERAL LANDS.

The language last above quoted is unambiguous and makes the Midwest decision applicable to all of the withdrawal cases pending in this Court. The Court should, however, bear in mind that the words “locator” and “location” as used by the Supreme Court refer to cases where discoveries of minerals have been made. A person who has filed a location notice and posted the same on land and has done assessment work, but has not discovered mineral, is not a “locator” and has no “location.”

The Supreme Court of California in the case of *McLemore v. Express Oil Company*, 158 Cal. 559, considered at length the rights of a prospector who goes upon the public land and engages in work leading to a discovery of oil. It held that no right is acquired by such prospector prior to discovery. The court said:

“But where the location is incomplete, no question of assessment work is involved. What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view. Of such work, defendant's grantors were not in the prosecution up to April 12, 1907. They were not only in the actual possession of the land, as the Court finds, but the evidence discloses that what they had done was no more than to attempt to hold the land, under the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially able to prosecute it, and were either in search of capital to enable them to do so, or in search of purchaser to buy out such interest as it might be thought that they had.”

The same court in the case of *Borgwardt v. McKittrick Oil Company*, 164 Cal. 150, said:

“The rights of the person or persons endeavoring to locate an oil claim, after the posting of notice, etc., are well settled by the decisions. Until the inchoate location is perfected by discovery, the locator has no vested right which Congress is obliged to recognize. But where his location is made in good faith, he has the right as against third persons, which is transferable, ‘to be protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions, upon his possessions,’ so long as ‘he remains in possession and with due diligence prosecutes his work toward a discovery.’ *Miller v. Chrisman*, 140 Cal. 440, 447, (98 Am. St. Rep. 63, 73 Pac. 1084); *Weed v. Snook*, 144 Cal. 439, (77 Pac. 1023). As long as such a condition continues, no one without his consent can make the actual entry of the land essential to legally initiate a new location. But actual possession of the land coupled with continued diligent prosecution of discovery work are essential to his protection. What the attempting locator has is the right to *continue* in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery \* \* \*. Clearly, the mere ‘figuring’ with other persons by the locator as to what they will charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satisfactory to the attempting locator, which is the utmost plaintiffs’ evidence tends to show was done, cannot be held to constitute a diligent prosecution of the work of discovery, any more than the pursuit of capital to prosecute such



work can be held to constitute such diligent prosecution.”

The Supreme Court of Nevada, in the case of *The Ophir Silver Mining Company v. Carpenter*, 4 Nev. 534, after defining diligence as the “steady application to business of any kind, constant effort to accomplish any undertaking,” added:

“It is the doing of an act, or series of acts, with all practical expedition, with no delay except such as may be incident to the work itself.”

In the same case, referring to the contention that illness and lack of means should be taken into consideration in determining the matter of diligence the Court said:

“But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at all. Like the pecuniary condition of a person it is not one of those matters incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character.”

See also *Federal Statutes Annotated*, Vol. 5, page 10, and notes.

The decisions cited on that page refer, it is true, to discoveries of mineral lodes or veins. It is likewise true, however, that discoveries of minerals are

necessary to give rights to claimants of the public lands under the placer mining law. See *Lindley on Mines*, Vol. 2, Sec. 437.

The following is a quotation from the statute providing for location of placer claims:

“Claims usually called ‘placers,’ including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; \* \* \* ”

See Sec. 2329 Revised Statutes.

Congress provided that petroleum lands should be acquired under the general placer mining law. There has been no suggestion that a right to a patent, or other rights except such as were conferred by the Act of June 25, 1910, accrued until discovery.

The rules and regulations of the General Land Office with reference to discoveries on placer claims contain the following:

“But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.”

In *Tuolumne Consolidated Mining Co. v Maier*, 134 Cal. 583, the Court held there can be no valid location of a mining claim without an actual dis-

covery of mineral thereon. It further held that, conceding a previous filing without such discovery may become valid by a subsequent discovery of mineral, the land must be treated as government land up to the time of such discovery.

It is clear, therefore, that the Supreme Court of the United States meant, when it used the words "locator" and "location," in the Midwest decision, to embrace a discovery.

It is alleged in the bill of complaint that the defendants had not made a discovery of minerals on the lands in question on the 27th of September, 1909, and further that they were not at that date doing work leading to the discovery of oil or gas, and that they did not for a long time thereafter diligently and continuously prosecute such work; and, therefore, they were not protected either by discovery or by the remedial Act of June 25, 1910, Revised Statutes, Vol. 36, page 846. The defendants filed motions to dismiss based upon the idea that President Taft's order of withdrawal of September 27, 1909, was invalid.

Judge Dooling was of the opinion the President's order of withdrawal was invalid, and had so held in No. 47, a case before him while holding court in the Southern District of California. After the decision in the Midwest case he held the order was valid, and overruled defendants' motions to dismiss, issued injunctions, and appointed a receiver in that case and



in this. Judge Dooling's assignment to deal with these cases expired with the calendar year 1914. Judge Bledsoe delivered an opinion July 12, 1915, in three cases substantially similar to this case, in which he upheld the order of withdrawal and appointed a receiver. Extracts from it are copied in an appendix hereto.

The defendants cannot prevail in this case because the land is affected by the order of withdrawal of September 27, 1909.

THIS SUIT WAS PROPERLY BROUGHT IN A COURT OF EQUITY FOR REASONS AS FOLLOWS:

(a) THE PURPOSE OF THIS SUIT, AMONG OTHERS, IS THE ENFORCEMENT OF A GOVERNMENTAL POLICY.

It should be borne in mind that this is not a suit between private litigants, nor is it a suit, the prime object of which is to *quiet title*, or to *remove a cloud*, or to *recover possession of land* or to *recover damages for past trespasses*. It is a suit by the Government of the United States for all these purposes, but these are incidental, and the prime object is a purpose by the United States in its sovereign capacity as the owner and proprietor of the public lands to enjoin and restrain the unlawful actions of the defendants, the effect of which actions will be, unless restrained, a complete destruction of the very

substance of these lands and their contents. It is likewise one of the purposes of the United States to hold, until the final determination of the suit, the oil and gas heretofore produced and which will inevitably and unavoidably be produced hereafter, or the proceeds of the sale thereof. The jurisdiction of the Court on the equity side of the docket is beyond question.

*Coosaw Mining Company v. South Carolina,*  
144 U. S. 550.

That case is strictly in point and absolutely determinative of the question in favor of the Government. The suit was brought by the State of South Carolina in one of the State Courts, and subsequently removed to the Circuit Court of the United States. It was a suit in equity to obtain a decree enjoining the mining company, its servants, etc., from claiming any right, title, interest or grant in or to the phosphate rock deposits in Coosaw river in that State, also from taking, mining or removing such rock and deposits in the bed of that river, and from obstructing, by suit or otherwise, any agent or other person acting by authority of the State, from digging, mining and removing the same.

The appellant claimed in its answer to have a contract with the State, by which it acquired an exclusive right for an indefinite period to occupy, dig, mine and remove such rocks and deposits, and that in violation of the constitution the obligation of this

contract has been impaired by a subsequent act of the Legislature.

It will be seen that the facts and principles are identical with those in these withdrawal suits. The property involved was public property. The suit was by the owner of the public property,—the State in that case, the United States in these cases. The object is the same in both cases, namely, to enjoin any claim of right by the defendants, and also to enjoin the defendants from committing acts of waste or trespass upon mineral deposits in the said public land. The defense was the same in principle. In the Coosaw case the defendant claimed there was a previous grant by the State giving it the exclusive right to mine and remove the rock, while in the withdrawal suits the defendants claim that the United States, through the mineral laws, as applicable to oil lands, has given to them the exclusive right to drill wells and extract the oil deposits from said lands. They further claimed until the Midwest case was decided, that the withdrawal order was unconstitutional and inoperative against them, like the claim of the defendant in the Coosaw case, that the subsequent act of the Legislature was unconstitutional in impairing the obligation of their contract. The Supreme Court, in a unanimous opinion written by Justice Harlan, said:

“It is contended by the appellant that this case is not one of which a court of the United States sitting in equity, could take cognizance,  
\* \* \* . It is unnecessary, therefore, to inquire



whether, according to the principles of equity, as recognized in the Courts of the United States, the State can obtain relief by its suit in equity.

“The grounds of equity jurisdiction in such cases as the one before us, are substantially those upon which courts of equity interfere in cases of *waste, public nuisance and purprespature.*”

The Court then cited *United States v. Gear*, 3 How. 120, 121, 133, in which the United States, claiming to be the owner of certain lands upon which there was a lead mine, brought an action of trespass *quare clausum fregit* against a party in possession. They also brought a suit in equity for an injunction to stay waste. The Supreme Court held, in the equity case, that digging ore from lead mines upon the public lands, was such waste as entitled the United States to a writ of injunction to restrain it. It will not do to say that the *Gear* case is distinguishable because the Government had gone into a court of law before bringing the suit in equity. If that were the ground for the decision in the *Gear* case, it would not have been cited as an authority in the *Coosaw* case. Again, in the *Gear* case, the Government had not sued in ejectment,—in fact had brought no action at law to recover possession. It had not settled its title in an action at law prior to bringing the injunction suit. Nor does it appear that the injunction suit was merely ancillary, or to preserve the property during the pendency of the law action. (The only law action brought was merely to recover damages for past trespasses and defendant was in possession claiming title.)

In the Coosaw case the Court then cites *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, quoting therefrom that "it was said to be now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney General. \* \* \* upon the principle that equity can give more adequate and complete relief than can be obtained at law."

The Court then quotes from *Attorney General v. Richard*, 2 Anstr. 603, which was an information in equity, in the name of the Attorney General, to restrain the erection of wharves, and to abate those erected, which was sustained, the Court stating that, "where the King claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it."

The Court then cites *Attorney General v. Forbes*, 2 My. & Cr. 123, a proceeding sustaining an information in chancery for the purpose of preventing a public nuisance.

Quoting from *Gibson v. Smith*, 2 Atk. 182, in which an injunction was sought to restrain defendant from opening mines upon property held by him under a deed containing reservations against waste, and in which it was objected that the matter was not for a court in equity, it was said:

"Plaintiff may certainly come into this Court to restrain the defendant from opening the mines, etc., even if he had only threatened to do

it; nor is it necessary that plaintiff should have waited until the waste was actually committed, where the intention appears, and the defendant even by his answer insists on his right to do it.”

The Court then quotes extensively from *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361, in which it was held that the great ponds of the State of Massachusetts belong to the public, and like the tide water in navigable streams, are under the control and care of the Commonwealth, and the rights of fishing, boating, bathing, etc., which appertain to the public, are regarded as valuable rights, and entitled to the protection of the Government. It was held in this Massachusetts case, that if a corporation or person is found to be doing acts without right, the necessary effect of which is to destroy or impair these public rights and privileges, it furnishes a proper case for an information by the Attorney General to restrain and prevent the mischief.

The Court in the Coosaw case (p. 567) goes on to state:

“Mr. Justice Story said that an information in equity at the suit of the Attorney General, would lie in cases of purpresture, and public nuisance, the jurisdiction of the courts of equity being sustained because of ‘their ability to give more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation.’ Story’s Equity Jurisprudence, Secs. 922, 923, 924, and other authorities.



“Those principles are applicable to the present case. *A remedy at law for the protection of the State, in respect to the phosphate rocks, and phosphatic deposits in the beds of its navigable waters, is not so efficacious or complete as a perpetual injunction against interference with its rights, by digging, mining and removing such rocks, and deposits without its consent.* The Coosaw Mining Company unless restrained, will not only appropriate to its own use property held in trust for the public, but will prevent the proper administration of that trust for an indefinite period, by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have, is security for all time against illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphatic deposits in the bed of Coosaw river. Such security was properly given by the decree below.”

It will be seen from reading the arguments preceding the opinion in the Coosaw case, that all of the points made in the present case against the Court's jurisdiction, were likewise made in that case, namely, that there was an adequate remedy at law, that the complainant was not in possession of the property, and that its right to the property or

possession had not been adjudged. The point was made that "equity will not permit its remedies to be used to turn out one who is in possession, nor to prevent one in possession, claiming title, from reaping the fruits of possession."

(b) PAYMENT OF MONEY BY DEFENDANTS FOR OIL AND GAS WRONGFULLY EXTRACTED WOULD NOT ADEQUATELY COMPENSATE THE COMPLAINANT IN CASES LIKE THESE.

*Graves v. Ashburn*, 215 U. S. 331, was a suit in equity. The petitioners showed title in themselves to land derived from the State of Georgia, which land had upon it pine wood valuable for timber and turpentine. The bill alleged that by breach of trust and fraud, a deed was made purporting to convey to defendants certain portions of the land; that defendants had notice of the want of title, but nevertheless had let the timber privileges to another defendant, and the latter was about to cut the timber, and had already boxed the trees and taken turpentine from them. The bill sought an injunction against boxing trees, carrying away turpentine or cutting the timber, and cancellation of the fraudulent deeds. The Circuit Court dismissed the bill against one of the defendants, on the ground that the plaintiff had a complete remedy at law, and sustained the bill as to another defendant. There were cross appeals to the Circuit Court of Appeals, and that Court concurred with the lower Court, in dis-



missing the bill as to the defendant Crawford, but reversed the lower Court in not dismissing the bill as to defendant Ashburn, holding in this latter regard, "So far as the cloud upon the title was concerned, it did not appear sufficiently from the bill that the *plaintiffs were in possession*, and if they were, the deed to Ashburn did not continue a cloud." As to the cutting of trees, it was held that the remedy at law was complete. The Supreme Court, speaking through Mr. Justice Holmes said:

"We shall deal first with the last ground of decision which involves a difference of opinion between different Circuit Courts of Appeal. It is assumed, as was found by the Circuit Court, that the plaintiff's title was made out, and that the defendant is or may be responsible for the wrong. *If the defendant is responsible we are of opinion that an injunction ought to issue. The industry concerned is so important to the State of Georgia, and the remedy in damages is of such doubtful adequacy, that equity may properly interpose although under different circumstances an injunction against cutting ordinary timber might be denied. The policy of the State is indicated by Section 4927 of the Civil Code, 1895, continuing earlier acts. 'In all applications \* \* \* to enjoin the cutting of timber or boxing or otherwise working the same for turpentine purposes, it shall not be necessary to aver or prove insolvency, or that the damages will be irreparable.'* Although in form addressed to procedure, this implies a principle grounded upon a view of public policy (citing Georgia cases). The same result has been reached, apart from statute, by the Circuit



Court of Appeals for the 6th Circuit and in other cases. *Peck v. Ayers & Lord Tie Company*, 116 Fed. 273; *United States v. Guglard*, 79 Fed. 21; *King v. Stewart*, 84 Fed. 546.

“As the case is before us, it is proper to add that we perceive no sufficient reason for denying a cancellation of the deed to Ashburn. The first of these grounds is that plaintiffs did not allege that they are in possession of the land concerned. We infer that the premises or the greater part of them are wood land, and not inclosed by fences, but in their original natural condition. If so, *then possession is a fiction of law*, rather than a possible fact, *and it would be reasonable to assume that possession remains with the title.* (Citing certain cases.) We say more broadly, and without qualifying *Lawson v. U. S. Mining Company*, 207 U. S. 1, that in view of the statute, the relief, in case of such lands, should not be made to depend upon shadowy distinctions according to the greater or less extent of the trespasses committed. *Holland v. Challon*, 110 U. S. 15; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417-449. It has been intimated by the Georgia court that relief would be granted irrespective of possession. (Georgia cases.) *Sharon v. Tucker*, 144 U. S. 533.”

(Italics supplied.)

A great deal of stress is laid upon the fact that the public policy of Georgia, as expressed in the statute quoted, was in favor of treating the production of turpentine as a most important industry to the State, so important that as a matter of procedure, neither insolvency nor other irreparable injury, need be proven or alleged, *to entitle plaintiff*

to a preliminary injunction. This point is similar to the point involved in the Coosaw case.

In *Graves v. Ashburn*, the statute was merely evidence of the public policy of the State, and the public policy of the State of California is the same with respect to suits to enjoin waste and injury to mines, as was the public policy of Georgia with respect to waste and injury to timber by the taking of turpentine. This is shown by the statement of the Supreme Court of California in the famous case of *Mining Co. v. Fremont*, 7 Cal. 317, from which case the following language is quoted and cited with approval by Judge Wellborn in *United States v. Guglard*, 79 Fed. 21 (hereinafter referred to), as one of the reasons for sustaining the right of the United States to go into a court of equity in the first instance for an injunction against the cutting of timber on public land and for an accounting for timber already cut. The quotation in the Guglard case from the case of *Mining Co. v. Fremont* is as follows:

“In the case of *Gages v. Teague* (Oct. Term, 1857, not reported) this Court held that the mere allegation that the injury was irreparable, would not, in itself, be sufficient, but the complainant must show how. The same is stated as the rule in the case of *Amelung v. Seekamp*, 9 Gill. & J. 474. This is, no doubt, the correct rule, the facts must be stated to justify the conclusion of irreparable injury. *But in the case of mines, timber and quarries, the statement of injury is sufficient.* And in the nature of the

case all the party could well state, as a matter of fact, is the destruction of timber in the one case, and the taking away of the minerals in the other.”

See also

*United States v. Parrott*, 1 McCall, 271 Fed. Cas. No. 15, at p. 431;

*United States v. Gear*, 3 How. (44 U. S. 120).

In *United States v. Guglard*, 79 Fed. 21, it is said:

“Any injury to the inheritance or substance of the estate is irreparable. Growing trees are a part of the land whereon they grow, and their destruction is an injury to the substance of the estate.”

The Court in that case, quoting from *Mining Company v. Fremont*, 7 Cal., *supra*, said:

“Where a bill shows cause for equitable relief by injunction to prevent destructive and continuous trespass in the nature of waste, the Court, to prevent another suit, will decree an accounting and satisfaction for injuries already done (citing several cases), and when the jurisdiction is thus acquired, the fact that the items of the account are all on the one side, does not affect the rule. In some of the cases cited above, there was no mutuality in the accounts. As already stated, complainant’s right to an injunction is sufficient to sustain the jurisdiction of a court of equity, and, in the exercise of such jurisdiction a court will grant all the relief which the circumstances of a case require.”



It seems to me it would be illogical to hold that a court of equity had jurisdiction to enforce a public policy of the United States with respect to its public lands, and at the same time hold that an order should not be made enjoining the defendants and appointing a receiver in the present situation. If the action of the defendants complained of in the bills in these cases are purprestures or public nuisances, insolvency need not be alleged or other irreparable damages shown.

In *United States v. Brighton Ranch Company*, 26 Fed. 218, it is said by Mr. Justice Brewer, sitting on the Circuit Court bench and speaking for Judge Dundy, as well as for himself:

“The question made is whether the Government can come into a court of equity and avail itself of the summary remedies given by such a court. We are of the opinion that it can; *and whether the acts of the defendant comes within the technical definition of purpresture or that of a public nuisance we are of opinion that the Government can come into a court of equity, and by its orders have an end put to this trespass on public rights.* \* \* \*

“We think too, that an action of injunction is the appropriate remedy and that an action of ejectment would not furnish a full protection to the Government. Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon Government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also

to separate the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a court of equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property."

See also

*United States v. Parrott*, 1 McCall, 271 Fed. Cas. 15998, 7 Morr. Min. Rep.

### (c) MULTIPLICITY OF SUITS AVOIDED.

The court of equity will entertain jurisdiction for the reason, among others, that if it does not do so a multiplicity of suits would be required, instead of the one case now before the Court.

See

*Pomeroy's Equity Jurisprudence*, 3rd Ed.

Vol. 1, p. 356, et seq.; also Sec. 274;

*Sharon v. Tucker*, 144 U. S. 533;

*Preteca, et al. v. Maxwell Land Grant Company*, 50 Fed. 674;

*Bailey v. Tillinghast*, 99 Fed. 801;

*De Forest v. Thompson*, 40 Fed. 375;

*Osborne v. Railroad*, 43 Fed. 824;

*Sang Lung v. Jackson, Collector*, 85 Fed. 502;

*Boyd, et al. v. Schneider*, 131 Fed. 223;

*Bitterman v. L. & N. R. R.*, 207 U. S. at 226;

*Dodge v. Bridge*, 27 Fed. 161.

See also the two leading English cases generally known as:

*“The Case of the Fisheries”;*

*Mayor of New York v. Pilkington*, 1 Atk.  
282, and

*“The Case of the Duties”;*

*City of London v. Perkins*, 3 Brown Parl. C.,  
Tomlin’s Ed. 602.

(d) POSSESSION OF THE COMPLAINANT  
NOT NECESSARY TO SUSTAIN JURISDIC-  
TION OF A COURT OF EQUITY.

The main object of the bills in these cases is to restrain the continuous trespass and waste of the oil and gas, the very substance of the land,—in fact the only things that give the land any value. In this situation equity will take jurisdiction and settle all questions involved, including the question of right to possession.

See

*Peck v. Ayers & Lord Tie Co.* (C. C. A. 6th  
Cir.);

*Burt v. Cumberland Coal Co.*, 159 Fed. 905  
(C. C. A. 6th Cir., Lurton, Judge);

*Oolagah Coal Co. v. McCaleb*, 68 Fed. 86 (C.  
C. A. 8th Cir.);

*Big Six Dev. Co. v. Mitchell*, 138 Fed. 279  
(C. C. A. 8th Cir.);

*Story’s Eq. Jur.*, Sec. 840.

It cannot be said that the United States must be in the possession of the land in the sense of having



some officer or agent of the United States in actual possession. The public lands of the United States are so extended that this would be impossible, and furthermore, much of the public land of the United States is of a character that cannot actually be occupied until it is developed. Much of it is timber land; much of it is desert land, and other of it is swamp land, etc.

It is said in the case of *Graves v. Ashburn, supra*, 215 U. S.:

“We infer that the premises, or the greater part of them are wood land, and not inclosed by fences, but in their original natural condition. If so, then possession is *a fiction of law, rather than a possible fact*, and it would be reasonable to assume that possession remains with the title.” (Italics supplied.)

There are stronger reasons for applying this doctrine in the cases now before the Court. The bill of complaint, verified and used as an affidavit, alleges damage not only on account of the extraction of oil and gas from the lands, but on account of the infiltration of water into the oil sands. The extent of this damage is great, and there is no fixed standard by which to measure the pecuniary injury, and in such cases, the law is that it is irreparable.

#### THE RIGHTS OF THE GOVERNMENT AS A SUITOR IN COURT.

Much was said in the District Court to the effect that when the Government comes into court it has

no greater right than an individual. Generally speaking, this is true, but it is often misapplied. The Government in a suit to enforce a governmental policy can enforce rights which an individual does not possess. No individual acts for the public, and often the Government does. The distinction is illustrated by what the Supreme Court of the United States said in *United States v. Trinidad Coal Company*, 137 U. S. 160. That was a suit in equity brought by the United States to set aside certain patents conveying coal lands on the ground of fraud. The cause of action, in general, was that the Trinidad Coal Company had entered into a conspiracy with a number of individuals by which they fraudulently represented to the Land Department that they were acting in their own rights, and procured patents to a large amount of lands on an agreement to thereafter convey them to the Trinidad Coal Company, thus enabling it to obtain title to more land than was allowed. The Court said:

“It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity, when determining, as between private parties, whether particular relief should be granted; that the Government, asking equity, must do equity, and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to could not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of

the United States, the Government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands, had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people, and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but in the discharge of a higher public duty, and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. *The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions.* It is not disputed that the Attorney General may, in virtue of the authority vested in him, institute this suit. According to the allegations of the bill, which are admitted to be true, the defendant is a wrongdoer against whom the Government seeks to vindicate its policy in reference to the development of its vacant coal lands."

(Italics supplied.)

The Court then goes on to state that if defendant is entitled to a return of the money paid by it upon obtaining the patents, then it must be assumed that Congress will make an appropriation for that purpose when necessary.

"The proposition that the defendant, having violated the public statute in obtaining public



lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity, and, if sustained, would interfere with the prompt and efficient administration of the public domain."

In *United States v. Verdier*, 164 U. S. 213, at page 219, it is said:

"An inherent vice of petitioner's argument is in the assumption that he and the Government stand upon an equity with respect of interest. The truth is that in its dealings with individuals public policy demands that the Government should occupy an apparently favored position. It may sue, but except by its own consent, cannot be sued. In the matter of costs, it recovers but does not pay, and the liability of the individual would not be affected by the fact that he had a judgment against the Government which did not carry costs. So, the statute of limitations may be pleaded by the Government, but not against it nor is it affected by the laches of its officers. \* \* \*

"Under the bankruptcy law, it was a preferred creditor, and its claims were paid even before the wages of operatives, clerks, or house servants. *Rev. Stats. 5101. In short, the equities which arise as between individuals have but a limited application as between the Government and a citizen.*"

IS THERE ANY MERIT IN THE POSITION OF THOSE ON THE WITHDRAWN GOVERNMENT LANDS, THAT IT WOULD BE UNFAIR TO TAKE THE LANDS AWAY FROM OPERATORS?

It was insisted in the lower Court that:

“The Government is acting harshly, inequitably, and in bad faith. It is relying on legal technicalities to secure an unfair advantage. The great maxim that he ‘who seeks equity must do equity’ is totally ignored in the Government’s case.’ ”

When the President entered his order of withdrawal of September 27, 1909, Congress might have made it indictable for any person to enter upon or remain upon land in which there were no vested rights acquired, and thus protect these public lands, but Congress proceeded upon the assumption that respect would be paid to the President’s order of withdrawal, and that it would not be violated, and that only those who had acquired some vested rights would take oil from unpatented land. Under the allegations in the bill in this case the defendants were in possession of the public domain upon a mere gamble that the President’s order of withdrawal of September 27, 1909, was illegal. It is not denied that the entry upon the public lands by the defendants in these cases was in violation of this first order of withdrawal. The Government did not induce the defendants to think that the order of withdrawal was invalid. It did everything it could to

secure respect for and obedience of it. The President issued the order of withdrawal and thereby indicated it was his opinion he had the power to do so, but he recognized that the ultimate determination of the question of his power rested with the courts. Those who entered upon the lands in the face of this order of withdrawal were daring in their speculation and risky with their wagers; and as now when the courts hold that the order of withdrawal was valid and that they were trespassers from the beginning, and violators of the law, as well as disrespectful to the Chief Executive of the United States, there certainly is no basis upon which they can found a plea that they have acquired equities superior to those who, impelled either by timidity or by respect for the order of the President, remained out of possession of the land, or being in possession on September 27, 1909, surrendered their possession. The defendants forget that the primary position of the Government is to conserve the oil in the ground for governmental uses and purposes, until Congress shall determine what shall be done in the way of further legislation. These defendants, and all those who are similarly situated, seem to be seriously impressed with the idea that by violating the Government's policy and by destroying the corpus of the property, not only by the extraction of oil from the ground, but by creating a condition whereby it is impracticable to cease to withdraw it, and by letting large quantities of water into the oil sands and thus rendering useless and of no com-



mercial value that portion of the oil which the defendants and those similarly situated have not been able to extract, they have acquired equities as against the Government. They seem to be serious when they urge that notwithstanding they may have expended money in providing an equipment for pumping oil and left to be pumped with that equipment an emulsion of water and oil, or only of water, that nevertheless the Government ought to give them credit for the cost of the equipment, and that it would be inequitable not to do so.

To state the proposition plainly is to answer it. If the President's order of withdrawal of the 27th of September had been invalid, these defendants would have acquired title to the land as against the Government and as against every other citizen of the United States. In that event they would not have been dependent upon the recognition by the Government of equities which they claim to possess, but their legal title would have been all-sufficient, and they would have acquired by their operations, it is conceded for the purposes of this argument, the legal title to the land. If, on the other hand, they have with disrespect to the President of the United States, and in violation of a legal order of withdrawal, injured the public domain, contributed to the difficulties of the Government's executing its public policy with respect to petroleum on the public lands, and rendered difficult the problem of utilizing the Government's oil for the Government's Navy, they are in no position to receive what they call

equitable treatment at the hands of the Government by asserting in court that "the Government is acting harshly, inequitably, and in bad faith."

It is amazing if the defendants have not seen the want of logic in their contention, but from the insistence with which their counsel present their views, and their apparent earnestness of language and of manner, I am persuaded that perhaps they have not seen it.

Though the case of *United States v. Midwest Oil Company*, decided February 23rd, sustained the order of the President withdrawing these lands, the occupants have as strenuously resisted the efforts of the complainant to protect the lands from damage by trespass as before that case was decided, and are still resisting the efforts of the United States to deal with these lands.

#### CONSTRUCTION OF THE PICKETT ACT (36 STAT. 847) AND CONSIDERATION OF THE RELIEF AFFORDED BY THAT ACT.

The Act, by Section 1 expressly authorized the President, in his discretion, temporarily to withdraw from settlement, etc., any of the public lands of the United States, for public purposes. Section 2 provided that lands so withdrawn shall be open to exploration, discovery, occupation and purchase under the mining laws of the United States, other than coal, oil, gas and phosphates. The proviso to

Section 2 of the Pickett Act was for the relief of certain persons occupying such lands in the manner therein defined at the time of such order of withdrawal. The language of that proviso is as follows:

“*Provided*, That the rights of any person who, at the date of any order or withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work.”

The entire Act is copied as an appendix hereto. The bill of complaint and the motion of the defendants to dismiss negative the idea that the appellants were, on the 27th day of September, 1909, in *diligent prosecution of work leading to the discovery of oil or gas*, and that they continued in the diligent prosecution of such work.

It is not sufficient that they were on such date and were thereafter “occupants or claimants” of the land. The discovery of minerals was a condition precedent to the acquisition of any vested right to mineral land of the United States prior to the Act of June 25, 1910, as against the United States. That Act afforded relief to certain persons claiming “oil or gas bearing lands.”

The relief, however, was extended to those who at the date of an order of withdrawal were



- (a) Bona fide occupants or claimants; and
- (b) Who were at such date in diligent prosecution of work leading to discovery of oil or gas, "so long as" such persons "continued in the diligent prosecution of said work."

In considering remedial legislative acts it is proper to inquire into the conditions sought to be remedied. In the case of *United States v. Midwest Oil Company* the Court took judicial notice of all public documents. That this may be done is the settled rule of law.

On May 13 and 17, 1910, there were public hearings before the Committee on Public Lands of the House of Representatives. The proceedings before the Committee were reported to the House, and the report, together with the proceedings, has been published. (H. R. 24070.)

The Pickett Act (36 Stat. 847) was responsive to the requests of the representatives of the Committee of the California oil operators who appeared before the House Committee, and stated the grievances of those, whom it was represented had sustained undue hardship by reason of the order of withdrawal of September 27, 1909.

I quote from the published hearings before the House Committee (H. R. 24070) as follows:

"Mr. Smith: [a member of Congress and a member of the Public Lands Committee]. I

understand that Mr. Weil of San Francisco will make some preliminary statements, and then he will call on others, according to an understanding that they have, in relation to the different features of the subject."

On page 4 of the published hearings appears the following:

"Mr. Weil. Mr. Chairman and gentlemen of the committee: Day before yesterday the Senate Committee on Public Lands gave us an opportunity to present certain facts in relation to the conditions in the oil fields in California. I understand that there is a strong possibility of any bill that is passed by the Senate, or which may be passed by the House, going into conference between this committee and the Senate Committee on Public Lands. With the permission of this committee I will present the same facts to it, so that it may be equally advised with the Senate Committee as to the situation.

"The line of facts that we presented to the Senate Committee was as follows: We desired to show to the Senate Committee, by statements and maps, that the bulk of the land which is sought to be withdrawn is already in private ownership. Furthermore, we desired to present to the committee the geological situation in those fields, in the entire oil section and oil belt of California. We also desired to show the hardships which will be imposed upon many operators who have been proceeding in good faith under existing laws.

"Mr. Thomas O'Donnell, of the city of Los Angeles, is one of the oldest operators in the field—that is, not in point of years but in

point of experience. He is one of our pioneers there, and is thoroughly familiar with all the facts. He has caused a series of maps to be prepared, for the accuracy of which we can vouch. We desire to present these maps first to you, gentlemen, in order to show you how the lands are held in the California oil fields."

It appears from the published hearings that Mr. O'Donnell, referred to by Mr. Weil, was chairman of the delegation which appeared before the House Committee. The following are extracts from the statement of Mr. O'Donnell, as appear in the published hearings referred to:

"It has been decided by all of the courts in the United States that in order to comply with the terms of that law it was necessary for the petroleum miner also to make a discovery on the piece of land on which he was located. The placer miner, looking for gold, could go along with a shovel and turn over a little gravel and get a color of gold, and he had then made the necessary discovery. But our petroleum in California is in many instances 4,000 feet under the earth; and it is being developed successfully today from that depth.

"You gentlemen can readily see the absolute necessity for the oil miner to go upon this land and proceed to make that discovery. In many instances, gentlemen, with the difficulties that have risen in this development, it has taken years to find out whether a piece of land was really oil land or not and to make the discovery which is necessary before you can make application to the Land Department and acquire title to the land." (Page 5.)



“Mr. O’Donnell. The danger exists just the same, because the President has already withdrawn a great many of these lands; and it is our belief that the law is such that the withdrawal of these lands will prevent the acquisition of title to them. We believe that this measure was passed in a way for the purpose of conserving the resources of the nation, so that the government lands should not be wasted, and for various other reasons which you gentlemen are more familiar with than I am.” (Page 5.)

“Mr. O’Donnell. \* \* \* Many controversies have been brought about in regard to these lands by people locating large quantities of them and not doing anything with them. But the courts have corrected that; and if the law were specific and definite enough, as interpreted by the ruling that the courts have made, in my judgment the present law would be sufficient. But we do admit that to that extent the law should be amended.” (Page 6.)

Mr. Weil interjected the following remarks while Mr. O’Donnell had the floor before the committee:

“Mr. Weil. The effect of that decision was this, Mr. Chairman: Under the placer mining laws the placer miner has no rights between the time of location and the time of discovery. But where a man has located a piece of placer mining ground—for oil, for instance—and it takes him two or three years to validate his location by making a discovery, the courts have held that during that period of time, so long as he is operating in good faith and attempting to make a discovery on the land, no one else

can initiate a valid location against him by clandestine or surreptitious entry.

“Mr. Robinson. What cases have held that?

“Mr. Weil. One of them is the case of *Miller v. Chrisman* (140 California).

“The Chairman. Was that as between two mineral claimants?

“Mr. Weil. Yes, sir; not as against the Government. The difficulty here is that we concede that we have no rights against the Government until we have made a discovery.” (Page 6.)

“Mr. O'Donnell. What I want to get at is this: The placer mining laws, as they have applied to California development, have been good. The decisions of all of the courts have been good. There have been attempts to abuse the law. Whole counties have been located under the so-called rights that the locators would have under the placer mining law. But in no case has such a claimant succeeded in obtaining patent for those lands from the Government, because the courts have ruled that anybody had a right to go upon them. When they were in legitimate pursuit of discovery they were seldom disturbed. The fact that it was necessary to drill an oil well on every 160 acres and get an oil well before you could hold it has tended toward the development of the Pacific coast to the extent that it is now developed.” (Page 9.)

“Mr. O'Donnell. \* \* \* If the placer mining laws as they stand today could definitely establish what is the legitimate pursuit of discovery, they would be sufficient. I do not believe in disturbing a man when he commences to drill a well. I do not believe it does the poor man

or anybody else any good to permit him to go and take 40 acres or 80 acres or 100 acres, and sit down on it and not do anything with it. It does not do him any good, nor does it do the industry any good.” (Page 10.)

“Mr. Pickett. The Pickett bill provides two things: First, it confers authority upon the President to withdraw public lands in certain cases. Secondly, it confirms the authority heretofore exercised.

“Mr. O'Donnell. Yes.

“Mr. Pickett. You said a moment ago that if this bill became a law it would destroy the rights of one-half of the oil companies in this Coalinga field.

“Mr. O'Donnell. Yes.

“Mr. Pickett. Will you please explain to the committee, so that it will go into the record, how that will be done? Get down to the proposition that is in issue here.

“Mr. O'Donnell. The proposition is that we believe that we have no rights as against the Government until discovery has been made; that in all of these instances no discovery has yet been made; although millions of dollars in the aggregate have been expended; that there has been a disposition (perhaps not intentional) on the part of the department to withdraw all of our public lands out there; and that the Secretary of the Interior has already withdrawn many of these lands.” (Page 15.)

“Mr. Lacey. \* \* \* The Pickett bill in express terms ratifies every withdrawal heretofore made. Some of these men have discovered or are about to discover oil that they have been after for two years; in some cases they have



discovered it since the withdrawal; but the bill does not protect them.

“That is the situation from the legal standpoint.

“Mr. Pickett. Then as I get the thought as you present it, Mr. Lacey, it is this: The particular feature of the bill to which they object is the ratifying clause?

“Mr. Lacey. Not only that, but it is a retro-active clause in one sense of the word.

“Mr. Lacey. One or two very simple amendments should be made in the Pickett bill that would protect the moral rights of these men, if that bill is to protect those men who have initiated locations and gone on and spent their money.” (Page 16.)

“Mr. Pickett. I assume from the statements here that the objection to that is based upon the theory that they have already expended money, and so forth, and acquired what they consider to be valuable rights. That being the case, I, for one, as a member of the committee, would like to have them direct their attention to the facts material to that issue.

“Mr. Lacey. That is what Mr. O'Donnell desires to do; and if he is permitted I think he can make it clear.

“Mr. Pickett. And whether the money had been expended prior to the withdrawal, or whether they went in subsequent to the withdrawal with a view of gambling upon what would be the final adjudication of the legal rights.” (Page 17.)

“The Chairman. The withdrawals, then, have gone far beyond any proven territory?

“Mr. O'Donnell. Oh, my, yes! This is what

is known as the 'South Coalinga field,' and is an extension of the first map (producing a second map, which was later marked 'No. 2'). In that distance there has perhaps been expended in the last year over \$1,000,000 in pursuit of discovery where no discovery has yet been made. They have been operating more or less in there for the last ten years; but during the last two years the development has been stimulated by success at other places. Everybody in that district that is on government land would lose his rights, in our judgment, if the bill were allowed to stand in its present form." (Pages 17 and 18.)

"Mr. O'Donnell. \* \* \* In the drilling of those wells, which in some instances it has taken them two years to drill, we use heavy iron pipe. The formations there are soft; and we have to keep moving that pipe up and down from the time some of those wells are started for one solid year. They never stop; they work night and day. There are instances where, in order to keep your hole large enough and prevent the necessity of putting in five or six thousand dollars' worth more casing, it is necessary to keep that casing moving, in some instances every hour, to prevent the formation collapsing against it and adhering to it. There is no time after you start on a wild-cat well when you can suspend operations without serious results, and the probable loss of your entire investment.

"Now the Government comes along and withdraws these lands. It does not recognize that we have any rights; and we have either got to go ahead with this work or admit right there that we never can get it." (Page 18.)

"Mr. O'Donnell. There is a considerable

portion of it that is located; but the workings of the placer-mining law will take effect, perhaps, in that country after discovery. Men can not hold, under the rulings, any more of that land than they are drilling a well on—160 acres. There has been for the last twenty years in California, as I told you, this sort of thing about a fellow going out on the 1st of January, with the idea that he was getting something, and locating these lands, never making any pretense of doing anything with them, you know. First the idea was that you were jumping somebody's land when you went on land that was located; but that has practically been eliminated, and it has operated for the benefit of the oil industry.

“The Chairman. One more question. Have you any approximate data as to the number of 160-acre tracts upon which work was undertaken before withdrawal, where discoveries have not been made?

“Mr. O'Donnell. With just my personal knowledge of the development of the field, I could perhaps take the maps and in a couple of days get that for you. I had not considered that necessary; I had not thought of it. I can see that it would have a bearing all right. \* \* \*”  
(Page 19.)

“Mr. Weil. In response to Mr. Pickett's question, you said that the reason the work was continued on these lands was that it was generally believed the withdrawal order was invalid. Is it not a fact that in order to preserve the value of the workings, it was necessary to keep right on, in order to keep the casing loose in the wells?

“Mr. O'Donnell. That is the general condition; yes.



“Mr. Smith. Let us suppose that you ceased working as soon as you heard of the withdrawal. What would have been the effect on the wells?”

“Mr. O'Donnell. I might just as well have quit individually. That is what I probably would have done.

“Mr. Smith. Could you reopen them at all?

“Mr. O'Donnell. No. Where my greatest personal interest is concerned, I would have been unable, perhaps, to have continued at all.”  
(Page 42.)

“Mr. Pickett. I should like to ask this question of some one of these gentlemen here who is authorized to speak for the California delegation present. How much or how little (whichever way you want to put it) do you think a man should do upon one of these locations in order to come within the protection of the law?

“Mr. Ewing. Let Mr. O'Donnell answer that. He is the most practical oil man present.

“Mr. Pickett. That brings it down to the point in issue.

“Mr. O'Donnell. Gentlemen, I do not believe we want to claim anything from the Government of the United States out there except on those lands where there is an actual pursuit of discovery. It is hard to determine just where the pursuit of discovery commences; but it has got to be legitimate and continuous. That is the line of all of the decisions in all of the cases we have had in California, when a contest has been raised over these lands. The question has been whether a man was continuously working to the end of making a discovery; whether he was building a pipe line to the land, getting his houses ready, providing his material, haul-

ing his machinery on, or whatever it might be—in other words, whether he was legitimately trying to drill a well upon that territory and make his discovery.

“I do not believe any of us want to tie up these government lands and hold them for indefinite periods by making some pretense of putting up a derrick or putting up a cabin, or anything of that kind. As a practical man, knowing nothing about law, I should say that if a provision is inserted in this bill following out the line of those decisions and the practice that they have led to, I believe it will protect the interests of those that are expending money in an effort to make these discoveries, and that any pretense to that end will not acquire these lands.

“Mr. Smith. Let me ask you about this a little more specifically, because I am anxious to get further information for my own enlightenment. Conditions have changed a little since I had some intimate knowledge of oil development in California five years ago. Suppose we pass the bill as it is now proposed to be amended, and the President, on the 20th day of June, issues his order that ‘All the vacant and unoccupied lands in townships 29 and 24,’ say, ‘are hereby withdrawn from location and entry.’ Then the question will arise, ‘Was a given piece of land vacant and unoccupied on the 20th day of June?’ Now, what will constitute the minimum proof that will be necessary? Of course we can understand the maximum. What would constitute, in your mind, the minimum amount of effort on, we will say, the northwest quarter of section 20, to show that it was occupied before the 20th day of June? I think that is the concrete case that is presented to us.

“Mr. Ewing. Will you permit just a suggestion, Mr. Smith? The question you have asked us is a judicial question. In my judgment, you constitute a legislative body. When you say, ‘vacant and unoccupied,’ you are no longer interested in what the courts may determine those words to mean.

“Mr. Volstead. I think we are.

“Mr. Smith. Oh, yes; we are.

“Mr. Pickett. I want to say to you that I am very much interested in knowing what the courts are going to say about that before I vote for the legislation. That is the very purpose of this inquiry.” (Page 73.)

After these hearings and upon these representations, Congress passed the Pickett Act of June 25, 1910. There was a proviso in it, as follows:

*“Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work.”*

It appears, therefore, that about eight months after the withdrawal order of September 27, 1909, a delegation of oil operators, acting for themselves and representing others, made known to Congress just what remedial legislation was required to meet the so-called equities of operators, and Congress responded by giving substantially the relief asked



for. Any rights which the defendants in these cases have under the remedial legislation of the 25th of June, 1910, are being exercised without challenge by the complainant.

Notwithstanding all this, the defendants now assert that the action of the Government in bringing these suits against those who are not protected by the Act of June 25, 1910, is "harsh, inequitable, and in bad faith."

It is now asserted that the withdrawal order of the 27th of September, 1909, was generally thought to be void. It is evident, from what was said before the Public Lands Committee of the House, that there was at that time belief by some and strong suspicion in the minds of all the interested parties that the withdrawal order would be held to be valid.

The decision by the Supreme Court of the United States in the Midwest case, that the withdrawal order of September 27, 1909, was valid, settles that question in favor of the complainant; and those who violated that order of withdrawal and are not protected by the Act of June 25, 1910, have no just cause for complaint that the Government protests against their further trespass upon the public domain.

It may be there are a larger number of people in California and Wyoming who ceased to trespass on the land, out of respect for the President's order

of withdrawal of September 27, 1909, than there are those who disregarded it. These, and the public generally, are entitled to more consideration than those who have entered upon the land after the order of withdrawal, or who have otherwise violated its terms, and are not protected by the Pickett Act.

It now becomes material to inquire just what benefits were conferred by the Pickett Act on those who had not discovered oil on the 27th day of September, 1909, but who were bona fide occupants or claimants and were in diligent prosecution of work leading to the discovery of oil or gas, and who have since found oil or gas in the withdrawn lands. In other words, it is material now to inquire what is meant by the first proviso of Section 2 of that Act which says that such persons so claiming and so operating shall not be disturbed in their rights "*so long as such occupant or claimant shall continue in diligent prosecution of said work.*" It will be noted that there is no provision for the patenting of the lands upon which such work is being done, unless oil had been discovered prior to the withdrawal.

If oil had been discovered prior to the 27th day of September, 1909, as provided by the Act of February 11, 1897, so as to show that the land was more valuable for petroleum than for any other purpose, the person so making the discovery would have had the right to a patent, and such person would not need to invoke

the protection of the Pickett Act. In the absence of such a discovery no rights to the lands existed.

Who is it then who is referred to in the first part of the proviso of the Pickett Act, above quoted, in the following language:

“\* \* \* that the rights of any person at the date of any order of withdrawal heretofore made \* \* \* shall not be affected or impaired \* \* \*”?

The answer to this question may be found in Section 2319, Revised Statutes, which provides for the right to *explore* for and *purchase minerals*, as distinguished from the right to occupy and purchase the land in which the minerals are found. The Pickett Act does not provide that a person who is in possession of land, pursuing work leading to the discovery of oil, when the land is withdrawn, acquires title to the land when petroleum subsequently is discovered. It merely provides that the rights—which, it is insisted, embrace only the rights of an explorer for minerals—shall not be affected *so long* as such occupant or claimant shall *continue in diligent prosecution* of said work.

It would seem to follow, therefore, that the persons protected by the Pickett Act are those who were in prosecution of work leading to the discovery of oil on the 27th of September, 1909; and that the time during which they were so protected is the time of the continuation of such work. In no event, however, are rights conferred upon anyone who was not, on the



27th day of September, 1909, in the diligent prosecution of work leading to the discovery of oil, and who did not diligently continue the prosecution of such work.

Respectfully submitted,

T. W. GREGORY,  
Attorney General.

E. J. JUSTICE,  
Special Assistant to the Attorney General.

October 23, 1915.

## APPENDIX.

## OPINION OF U. S. DISTRICT JUDGE

United States of America,	}	Equity Suit No. A-12
<i>Plaintiff,</i>		
vs.		
George W. McCutcheon, Obispo Oil Co., et al.,	}	Equity Suit No. A-13
<i>Defendants.</i>		
vs.		
United States of America,	}	Equity Suit No. A-30
<i>Plaintiff,</i>		
vs.		
David Kinsey, Midway Field Oil Co., et al.,	}	Equity Suit No. A-30
<i>Defendants.</i>		
vs.		
United States of America,	}	Equity Suit No. A-30
<i>Plaintiff,</i>		
vs.		
Midland Oilfields Co., Ltd.,	}	Equity Suit No. A-30
<i>Defendants.</i>		
vs.		

Application is made in each of the above entitled cases for the issuance of an injunction in the nature of a restrain of waste, and for the appointment of a receiver to take charge of and operate the oil wells situate upon the properties in controversy. Substantially the same state of facts is presented in each case, and the legal questions presented for determination are essentially similar. All are suits to quiet the title of the government in and to certain oil lands in this State now in the possession of and claimed under oil land locations by the respective

defendants. The basis of the government's claim in this behalf is that the lands were withdrawn from entry and location by the government and that in consequence the entry of the respective defendants thereon has served in no wise to give them any rights as against the Government.

It will be remembered in this connection that on September 27, 1909, the President of the United States issued his much discussed withdrawal order, temporarily withdrawing from all forms of location, settlement, etc., certain specified public lands, including those in controversy herein, then belonging to the United States government; and, although the validity of this order was challenged at every step by those interested in the oil industry, it successfully withstood every attack and was finally and definitely upheld in its every aspect by the Supreme Court of the United States, in *United States v. The Midwest Oil Company*, decided February 23rd, 1915. All of the lands involved in these cases were included within the terms of the withdrawal order.

In the Kinsey and Midland Oilfields Company cases the facts as alleged in the verified bills are *comparatively* simple. In the Kinsey case it is alleged that the plaintiff, the United States government, now is, and at all the times mentioned and ever since the Treaty of Guadaloupe Hidalgo has been the owner and entitled to the immediate and exclusive possession and enjoyment of all of the lands described in the bill, and particularly all of the oil, petroleum, gas and other mineral therein contained. That at all times mentioned all such lands have been and now are part of the public domain, except as withdrawn and reserved from entry as is hereinafter alleged. That said lands now are and at all times have been oil and gas bearing



lands, containing rich deposits of petroleum or mineral oil and gas in commercially paying quantities, and at all times said lands have been and now are chiefly valuable for the petroleum or mineral oil deposits therein.

It is then alleged that on the fourteenth day of September, 1908, the Secretary of the Interior duly and regularly withdrew and reserved the said lands from settlement, entry or purchase, under the agricultural land laws of the United States, for the purpose of examining and classifying them. On June 9th, 1909, the said lands were duly and regularly classified by the said Secretary, as petroleum or oil bearing lands. On September 27th, 1909, the President of the United States, under authority legally invested in him so to do, duly and regularly withdrew and reserved all of said lands by the withdrawal order hereinabove referred to. On July 2nd, 1910, the President under the authority specially invested in him by virtue of the provisions of the Act of Congress approved June 10th, 1910 (36 Stats. 847), duly and regularly ratified, and continued in full force and effect his order of withdrawal of September 27th, 1909, aforesaid, and did further withdraw and reserve all of such lands from mineral exploration, occupation, and from all forms of location, settlement, application, selection, etc., under the mineral or non-mineral public land laws of the United States. That both of said orders of withdrawal and reservation have ever since their respective dates been, and now are, in full force and effect.

It is next alleged that there was no petroleum or other mineral produced or discovered on said lands until long after July 10th, 1910, but it was first produced thereon on or after March 15th, 1912, by the Midway Field Oil Company, one of the

defendants named, and that there was no other production by any of the defendants, or any other person, of petroleum or mineral oil or gas, or other mineral, on said premises, until long subsequent to March 15th, 1912. Several placer mineral locations upon said land are then specifically referred to, but speaking of them in gross, it may be said that all of them that were made prior to September 27th, 1909, were abandoned by their respective locators, and that none of the locators thereof ever made any discovery on said lands.

It is alleged that on June 8th, 1910, the "Blue Feather" mineral location was made on said land, and that on June 9th, 1910, the "Midway Mine" location was made thereon.

It is also alleged that subsequent to the second day of July, 1910, the United Midway Oil Land Company, claiming under and through the said "Midway Mine" location, entered upon said property, and that, thereafter, the Midway Field Oil Company, as its lessee, entered upon said property under and by virtue of said "Midway Mine" location, and after drilling a well upon said claim, made a discovery of oil thereon, and proceeded to and are now extracting from said land large quantities of petroleum and mineral oil.

It is also alleged the Union Oil Company of California, the only other operator upon said claim, entered thereon subsequent to the second day of July, 1910, and made a discovery thereon, and effected a subsequent production of oil therefrom.

It is then alleged that no discovery of oil or petroleum upon said premises has ever been made upon any part of said land except as is hereinabove set out; that no valid location or entry of, or claim



to, said land under the public land laws, or otherwise, was ever made by defendants or either of them; and that, on the 27th day of September, 1909, there was no locator or person in occupancy of the said claim, as claimant or otherwise, and that, on the 2nd day of July, 1910, there was no person or corporation in diligent prosecution of work leading to the discovery of oil or gas on said lands under any location or pretended location, or otherwise.

It is then alleged in apt language that the defendants have no rights upon said lands; that they are trespassers thereon, and are extracting oil and gas therefrom without right, and to the irreparable injury of the proprietary rights of the plaintiff in and to the said property.

It is also alleged that the value of the lands referred to exceeds one million dollars.

In the Midland Oilfields Company case, the bill of complaint in which was filed March 30th of this year, with reference to the particular matters in controversy, it is alleged that the President made the withdrawal order of September 27th, 1909, hereinabove referred to including the lands in controversy in the suit, and that notwithstanding such order, and in violation of the proprietary right of the plaintiff, and of the lawful orders and proclamations of the President, and particularly in violation of the aforesaid withdrawal order, the defendants named, entered upon the premises in controversy long subsequent to the said 27th day of September, 1909, but that some time after the year 1910, one of the defendants discovered petroleum on said lands, has since produced and caused to be produced large quantities thereof, and threatens to continue the extraction and sale of the same.



It is then alleged that none of the defendants or any other person was bona fide occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas on September 27th, 1909.

It is alleged that the value of the lands in controversy in this suit exceeds five hundred thousand dollars.

General allegations are made in all the complaints that the defendants in possession and engaged in producing oil from the respective properties, involved, are actually extracting oil therefrom in large quantities, and converting the same to their own use; that defendants threaten to continue so to operate said properties and otherwise commit waste and trespass upon the lands of right belonging to plaintiff, to its irreparable injury and in violation of its settled policies with respect to the conservation of its petroleum deposits.

It will be observed that in both of the cases last hereinabove referred to, the initiation of the rights of the defendants upon the lands in controversy occurred subsequent to the date of the Presidential withdrawal order of September 27th, 1909.

Referring to the facts pleaded as affecting defendants' rights under the withdrawal order, it may be stated generally that no discovery of oil was made on the property involved in the McCutcheon case prior to June 6th, 1910, at which date a discovery was made, and oil and gas were produced by defendant Pacific Midway Oil Company. This discovery and production of oil was made under and pursuant to an oil placer location upon the

premises in question, of date February 12th, 1909, or possibly prior thereto. Under that location the Obispo Oil Company, as assignee of the locators of the land in controversy, entered upon the lands on or about March 1st, 1909, and began active operations in the matter of drilling for oil. After a well had been drilled several hundred feet it was found impossible to continue the operations thereat, whereupon the rig was moved, and a new well was started. Thereupon a second well was drilled to a depth of almost five hundred feet, when, some time during the month of July, 1909, the company having exhausted all of its available funds, the work was discontinued. On August 31st, 1909, the committee appointed by the stockholders of the company at a meeting held on the 30th day of July, reported that on August 5th they had visited Maricopa and had secured an agreement from the McCutchen brothers (the original locators hereinabove referred to) that the company might have an extension of ninety days during which to make arrangements to continue drilling operations. The committee further reported that they had discharged the employees, had shut down the well, and left the properties in charge of a keeper at a salary of \$65 for the balance of the month of August. Some time in September a house on the land was occupied by a care-taker, who continued thereon, without salary, until March 1st, 1910. The Obispo Company never resumed work on the claim. Some time during the latter part of February following, the Pacific Midway Oil Company, as an assignee or successor in interest of the Obispo Oil Company, began operations on the property.

The two old wells hereinabove referred to were examined by the Pacific Midway Company and after some experimentation were found unserviceable, whereupon the drilling rig was moved and a third



and entirely new well started. This was in March, 1910. The work was pushed forward with diligence and a discovery of oil was made by the medium of such well on June 5, 1910. Thereafter other companies, referred to in Judge Dooling's opinion, went upon the property and after some large expenditures of money produced oil in paying quantities. In this connection it may be suggested that upon the refusal by the land office, as hereinabove referred to, to issue a patent to the Pacific Midway Oil Company, an opinion was rendered and from such opinion, containing a statement of the facts involved, the foregoing summary has been taken. This I do, not that I feel that the Court is bound, in this proceeding, by the finding of fact of the land department of the government, but because of my belief that the facts as stated in said opinion are in accordance with the truth of the controversy.

With reference to the situation existing on the date of the Presidential withdrawal order of September, 1909, it may be said, that in addition to the facts as stated by the Commissioner of the General Land Office in his opinion, one of counsel for the defendants in his brief says: "The caretaker had been in the employ of the Obispo Oil Company and was then working on an adjoining piece of property, and lived, with his family, on this property, rent free, and with the assurance of further employment when operations should be resumed." Another counsel, in the brief used before the land department and also presented to the Court herein for its consideration, said with reference to the transaction occurring on or about the date of the withdrawal order: "The continued active operations of the Obispo Company embraced a period from February, 1909, to August 5th. During this period they drilled well No. 1 to a depth of five hundred feet, when they encountered shift boulders which crushed the



pipe. Then they moved the rig a short distance away and started drilling. In this they reached a depth of 470 feet, when operations were suspended—August 5th, 1909—by reason of financial difficulties. On this date a committee of stockholders of the Obispo Company visited the ground. Up to this time there had been expended by the Obispo Company somewhere between fifteen thousand and eighteen thousand dollars on this venture. The committee ordered the operations stopped, put Watterson, one of the drillers, in charge to take care of the property at a salary of \$65 per month, and secured from McCutchen brothers, by W. C. McCutchen, an agreement permitting a suspension of drilling for ninety days. \* \* \* At this time and subsequent to September 10th, 1909, a man by the name of May and his wife moved into the house on the quarter at the instigation of the Obispo Company to hold possession of the property. Watterson, who had been employed by the committee of the Obispo stockholders, left about September 9th. The Mays were simply holding possession by residence on the ground, but were not paid employees. May was subsequently employed when operations were resumed by the Pacific Midway.” \* \* \* “It is conceded that between August 5th, 1909, and until operations were resumed by the Pacific Midway in February, 1910, that there was no active drilling upon the property. From August 5th until September 10th, 1909, Watterson was in possession as an employee of the Obispo. Thereafter May and his wife moved in *for the purpose of holding possession*. No salary was paid them, but they entered into possession *simply to hold it for the Obispo Company*.” (Italics mine.)

By a reference to the decision of the Supreme Court in the Midwest case, *supra*, it will be observed that though the Presidential order of withdrawal

of September 27th, 1909, purported to withdraw from all forms of location or settlement under the mineral or non-mineral public land laws, all the public lands specifically referred to in the lists accompanying the withdrawal order, yet this important exception was engrafted upon that order, viz: "All locations or claims *existing and* valid on this date may proceed to entry in the usual manner after filing, investigation and examination." (Italics mine.) It is obvious that it was not and could not have been the intention of the President, acting for and in behalf of his principal the United States government, to except from the operation of the withdrawal order all claims or locations that might then be subsisting upon lands included within such order. Special pains were taken to indicate that the intention of the executive was that only "*valid*" locations or claims were to be excepted from the general operation of the withdrawal order. In order to ascertain the extent of this exception it is necessary to define what, under the law, and within the meaning and true intent of the Presidential action, constitute a "*valid*" location or claim. In this behalf it should be remembered that "*valid*" is defined as "good or sufficient in point of law; efficacious; incapable of being rightfully overthrown or set aside; sustainable and effective in law, as distinguishable from that which exists or took place in fact or appearance, but has not the requisite to entitle it to be recognized and enforced by law." (Cent. Dict.)

What constitutes a "*valid*" mineral oil location, one "*sustainable and effective in law*" is very succinctly stated by the Supreme Court of California in *McLemore v. Express Oil Company*, 168 Cal. 559, p. 561 *et seq.* It is therein stated: "The principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and



that assessment or development work is the condition of their continued possession. But this rule applies only when the location is valid and complete. And a location is valid and complete only when, after compliance with other requirements, a discovery of valuable minerals in place has been made. In the case of ordinary minerals little or no difficulty has been experienced by the courts in this matter. In practice, the miner went upon the public domain, and, before he took the trouble to stake his claim and post and record his notice he made discovery. The staking of the boundaries of the claim and the posting of notice follows such discovery. When, however, Congress enacted that locations could and should be made of public lands containing petroleum or other mineral oils under the laws relating to placer mining claims (Act Feb. 11, 1897, 29 Stats. at Large, ch. 216, p. 526; U. S. Comp. Stats. 1901, p. 1435), the courts were at once confronted with serious difficulty in their endeavor to obey the congressional mandate, and fit the placer mining laws to the exigencies of oil locations which, in their nature, were radically dissimilar. Thus, it is well established, that the sole power of disposition and control of the public lands being vested by the constitution of the United States on Congress (Const. U. S., art. IV, sec. 3), Congress could at any time change its policy in regard to those lands so long as vested rights were not impaired. It was fully established also that a qualified person, who had made a valid location upon a part of the public mineral domain (which valid location always, of course, includes discovery), acquired vested rights, which no change in congressional policy could affect or impair, but *per contra*, that *a change in policy could impair the rights of one upon the public domain who had not acquired a valid location*. As has been said, in the case of other minerals, discovery preceded the demarkation of the boundaries,



the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick, the installation of machinery and the laborious drilling of a well, frequently to the depth of three thousand feet or more. If, therefore, the placer mining laws, which were declared by Congress to be the only laws under which oil locations could be established, were to be made of any practical benefit to the oil locator, it must be by permitting him to mark the boundaries of his location and post and record his notice, and *by protecting him in possession while he was with diligence prosecuting the labor of digging his well to determine whether or not a discovery could be made.* So it was held by the Federal Courts, by the courts of some of the other States, and by this court in *Miller v. Chrisman*, 140 Cal. 447 (98. Am. St. Rep. 63, 73 Pac. 1084, 74 Pac. 444), to the following effect: "One who thus in good faith makes his location, remains in possession and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must be always peaceable, open and above board, and made in good faith, or no right can be founded upon it. (*Weed v. Snook*, 144 Cal. 439 (77 Pac. 1023); *Cosmos etc. Co. v. Gray Eagle Oil Co.*, 104 Fed. 20, 112 Fed. 4, (50 C. C. A. 79); 190 U. S. 301 (23 Sup. Ct. 692); *Whiting v. Straup*, 17 Wyo. 1 (129 Am. St. Rep. 1093, 95 Pac. 849); *Moffatt v. Blue River etc. Co.*, 33 Colo. 142 (80 Pac. 139). But it is always to be borne in mind that until the perfection of the inchoate and incomplete location by discovery, the locator has, first, no vested rights which Congress is obliged to recognize. So that Congress may change its policy

in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. However inequitable such a proceeding might be, it in no way would be illegal \* \* \* What the attempting locator has, is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, *while he is diligently prosecuting his work to a discovery.* This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding, by cabin, lumber pile or unused brick. *It means the diligent continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view.*" (Italics mine.)

The gist of this decision, as I read it, is that after entry, and the initiation of the mineral placer claim by the oil locator, he has no vested right as against the government until he makes a discovery of oil upon the lands in question. In other words, the posting or recording of his oil placer claims gives him no rights as against the government until by discovery of oil it is made apparent that the land is in truth and in fact mineral land and subject to location under the mineral law. Having, however, initiated his claim, by the posting of his notices, he is protected as against third persons, as long as he "remains in possession and with due diligence prosecutes his claim toward a discovery." As long as he thus conducts himself, though as against the government he has no vested rights, nevertheless, he has rights which ought to be by all parties respected.

And, in this spirit, all locators who were thus conducting themselves at the time of the making of the withdrawal order, had their rights respected by the President by the exception contained therein,



and hereinabove referred to. That is to say, on the date that the withdrawal order was made, if any locator was then on withdrawn lands, in possession, and was "with due diligence" prosecuting his work toward a discovery of oil, by the express provisions of the withdrawal order, it did not affect him, he had a "valid" location, and he could, despite the general terms of the order, "proceed to entry in the usual manner," that is, proceed to a discovery and thereby perfect his right to the mineral claim. If, however, at the date of the withdrawal order such locator was not in possession, or was not with "due diligence" prosecuting his work toward a discovery, then he had no "valid" location, and in virtue of the efficacy of the withdrawal order as an act of a duly authorized agent of the United States government in that behalf, the order served to withdraw from further entry, location, settlement, or other disposal, the land so claimed by such locator. Furthermore, if, notwithstanding such situation, such locator, conceiving the withdrawal order to be entirely invalid, thereafter began or resumed operations looking to a discovery of oil upon his claims, he was met by the terms of the order itself to the effect that the land was no longer open to entry or claim, and that, as between him and the government, all subsequent efforts of his could not serve to divest the government of its proprietary title therein.

The Supreme Court having determined, after most careful consideration, that the withdrawal order in question was valid in its every aspect, and effectual as serving to withdraw from entry or settlement the public lands referred to therein, it indubitably follows that any entry made or claim initiated upon such land so withdrawn subsequent to the date of such withdrawal order, and while the same was in full force and effect, would be void and futile as against the proprietary rights of the United States



government. If discoveries of oil were made subsequent to the withdrawal order in virtue of claims initiated, however, prior thereto, and if at the time of the making of such order the locators of their successors were in occupation of the property claimed, and were at that time diligently engaged in the prosecution of the work looking to a discovery of oil therein they would be protected in their rights by the express terms of the withdrawal order itself. If they were not so engaged with diligence in endeavoring to effect a discovery of oil, then their rights would be no greater than, or different from, the rights of one who might have entered upon withdrawn lands subsequent to the date of the Presidential order, and as to such an one the Supreme Court has said in the Midwest case that his rights were *nil*.

In the Midwest case, with respect to the validity of the withdrawal order, and as its ultimate conclusion thereon, the Supreme Court said: "The long continued practice of acquiescence in Congress, as well as the decisions of the Court all show that the President had the power to make the order. And as was said in *Welsey v. Chapman*, 101 U. S. 769, the '*withdrawal would be sufficient to defeat a settlement \* \* \* while the order was in force.*'" In this connection it might be well to observe that the order remained in force until some congressional action or some other executive action annulled it. No congressional action was ever had in that behalf (Midwest Oil case, *supra*), and no executive action, except in so far as the withdrawal order of July, 1910, served to ratify it.

The claim seems to be made, and if I understand the opinion of the Land Department aright, is given recognition therein, that the scope or comprehensiveness of the withdrawal order of September, 1909,

was in some wise affected or enlarged by the so-called Pickett Act, passed June 25th, 1910. (36 Stat. 847.) The Supreme Court in the Midwest case, *supra*, held that there was nothing in that Act "indicating the slightest intent to repudiate the withdrawals already made under the executive order of September, 1909." The Court also said that "the legislative history of the statute shows that there was no such intention and no purpose to make the Act retroactive or to disaffirm what the agent in charge had already done."

It would seem to me that since the Act in question was passed some months after the promulgation of the executive order, and it having been held by the Supreme Court not to have been in any degree an impairment of that order, the conclusion ought to follow that the Act in no wise or at all affects the scope or purpose of the order. If it have any effect all, however, it is, in my judgment, in support of the conclusions hereinabove announced by me with respect to the general effect of the withdrawal order: this follows because by the terms of the Act itself it is provided that "the rights of any person who, at the date of any order of withdrawal heretofore \* \* \* made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is *in diligent prosecution of work* leading to discovery of oil or gas, shall not be affected or impaired by such order, *so long as such occupant or claimant shall continue in diligent prosecution of said work.*" (Italics mine.) If this provision amounts to anything at all it is tantamount to a declaration on the part of Congress itself to the effect that one who would claim the benefit of a location initiated previous to the promulgation of the withdrawal order but not followed by a discovery until after the order, must have been, at the date of the withdrawal order, in diligent prosecution of work leading to a



discovery of oil, and must have continued in such diligent prosecution until a discovery was effectuated.

If I am correct in my views of the law as hereinabove declared, the claims of the defendants in the Kinsey and Midland Oilfields Company cases, having been initiated subsequent to the promulgation of the withdrawal order of 1909, have no force or validity as against the holder of the paramount title, the government, and defendants' intrusion into, and trespass upon, the lands covered by such claims, stand without warrant; in consequence their further waste thereof should be enjoined, and the operation of the oil properties thereon should be committed to the hands of a receiver of this Court pending a final judgment quieting complainant's title thereto.

With respect to the questions involved in the McCutchen case I find much greater difficulty in arriving at a conclusion satisfactory to myself. I am persuaded that if under the law as stated, the Obispo Company had not a "valid" location at the date of the withdrawal order of 1909, then the subsequent efforts of their successors and assignees could not and should not be permitted to create a title to, or valid claim upon, withdrawn land. The real difficulty in the case, in this behalf, centers around a determination of the question as to whether or not the Obispo Company was "with due diligence" prosecuting its work toward a discovery of oil on its placer claim at the time of the promulgation of the withdrawal order. The Land Department, in the opinion hereinbefore referred to, has held that it was not prosecuting its work with due diligence at that time and that in consequence its claim was not valid. This conclusion of that department, confessedly, is not binding upon the Court and perhaps it ought not to be at all persuasive



with it. After a very careful consideration of the facts, however, as adduced from the record, and as admitted by counsel, and indicated hereinabove, I can come to no other conclusion than that the Obispo Oil Company was not prosecuting its work toward a discovery of oil with due or even any diligence at the time of the withdrawal of its land.

Recurring to the facts in the case, it will be remembered that the Company, because of a visit of its stockholders to the ground, and *because all of its available funds were exhausted*, discontinued and actually ceased work looking to a discovery of oil, on or before the 5th day of August, 1909, almost 60 days previous to the promulgation of the withdrawal order. It thereupon secured an extension of time under its contract with the original locators of the land, within which it might delay a resumption of operations. This extension of time lasted until November 5th, 1909, but nothing was done on the property at that time nor until more than three months thereafter. It further appears that the committee of stockholders discharged the employees and left the property in charge of a keeper under salary for a very short time. Thereafter a man, working on an adjoining piece of property, at the instigation of the Obispo Oil Company, moved onto the property and lived there, rent free, "*simply to hold it for the Obispo Company.*" Upon this state of facts it would seem to me as if the Court, upon the trial, would be compelled, indubitably, to indulge in the conclusion as a matter of law that no due diligence looking to a discovery of oil upon the property was evident, either at the date of the withdrawal order or for some months subsequent thereto. (*McLemore v. Express Oil Company*, 158 Cal. 559; *Borgwardt v. McKittrick Oil Company*, 164 Cal. 650; *Ophir Silver Mining Company v. Carpenter*, 4 Nev. 534.)

The point is made and urged with much force that it should not be held that the Obispo Company was lacking in diligence at the date of the withdrawal order, because they had theretofore expended a sum of approximately twenty thousand dollars in an endeavor to make a discovery of oil on the lands in question, and it is apparently insisted that that expenditure in itself, is amply sufficient to refute the claim of a want of diligence. It should be remembered, however, with respect to this, that under the facts shown, all efforts made by the Obispo Company in connection with the expenditure mentioned, were fruitless and the wells attempted to be sunk through such expenditure have actually, ever since on or about the 5th day of August, 1909, been abandoned, and if the defendants were given a clear title to all the land in question at this time, the expenditures made and relied upon herein by the Obispo Company would still constitute a false factor in their claim of title, because no muniment thereof would rest upon such expenditures. In other words, no discovery of oil at any time upon the premises in controversy in the McCutchen case was made through, or by means of, or at a place developed by, the monies laid out by the Obispo Company. When the Pacific Midway Oil Company, in the latter part of February 1910, took over the rights of the Obispo Company and entered upon its property, it examined the wells theretofore sought to be sunk to the oil sands by the Obispo Company, but found them upon such examinations wholly unserviceable, and actually sunk the wells which resulted in the discovery of oil, at a different place. In this wise it may be said, as I view the situation, that the expenditures of the Obispo Company as heretofore indicated, contributed in no degree or respect to the discovery of oil, and should not now be held as evidence of due diligence at the time of the withdrawal order.



In somewhat similar vein it is also urged that it would be highly inequitable, now, for the government to retake the title, so to speak, of these lands, after the defendant companies have gone upon them and made the expenditures of hundreds of thousands of dollars in the prosecution of work leading to a discovery and extracting of oil shown here by the facts. The simple and sufficient answer, however, to this contention is that all of these defendants went upon these lands at a time when they knew that they had been withdrawn from entry and settlement by order of the President of the United States. If they relied upon a claim initiated previously to such withdrawal, it was their bounden duty, under the circumstances, to investigate and consider whether or not such claim was "valid" and therefore within the protective provisions of the executive order. What they did, then, in that state of the case and in disregard of their duty to investigate, they must be held, and held rightly, to have done at their own risk. That they misconceived the law and determined in their own minds that the withdrawal order of 1909 was invalid, does not suffice, in the judgment of this Court, to secure for them any rights because of the expenditure made under such misconception. The Government of the United States did nothing to lead them to believe that the withdrawal order was invalid, and to hold that a party may deliberately refuse to recognize a valid executive order and thereby and because of such refusal profit himself, is to put at once a premium upon disregard of law and constituted authority, and make it the rightful privilege of every one to misconceive and disregard the law if in so doing he will thereby advantage himself. I can not believe such to be a safe or salutary rule, and in consequence feel that there are no equities of any sort or nature inuring to the benefit of those who now claim rights in these public lands merely because



of their disregard of the Presidential order of withdrawal thereof, and of their financial ability and willingness thereafter to prosecute to a successful conclusion a discovery of minerals thereon.

The contention is urged in the McCutchen case that a receiver should not at this time be appointed because of the fact that Judge Dooling has heretofore refused to make such appointment, and the claim is made that there is no change in the situation now from what it was at the time of the action of Judge Dooling. Waiving all other considerations, however, it may be said that the last premise is not well taken. There are two changes in respect of the situation differentiating it from that contemplated by Judge Dooling. In the first place, the withdrawal order which Judge Dooling held to be invalid had since been declared entirely valid by the highest court in the land. In the second place, and of more than slight importance, in my judgment, the Land Department of the Government, for reasons entirely satisfactory to itself, no doubt, has refused to grant a patent to the defendants to the precise lands in dispute. While this fact alone would not, in my judgment authorize or justify the appointment of a receiver by this Court at this time, nevertheless it may be taken into account in determining whether or not, in view of the changed situation, plaintiff may not be entitled to renew his application.

The point is also made that the Government being out of possession, is not entitled to a receivership in advance of a judgment in its favor in an action at law, awarding to it the possession of the various premises in controversy. Owing to the rapidity, however, with which the very substance of plaintiff's property is being wrongfully, as I view it, depleted, it is obvious that to deny plaintiff the provisional relief it seeks of this Court at this time, until it

should, perchance, have been victorious in an action at law, would be most successfully to deprive it of all the substantial fruits of the victory which that self same action at law would secure. If plaintiff is possessed of any rights in and to these properties, it is entitled to assert them now, because, in view of the continuous extraction of oil—the only valuable element of the properties,—the mere lapse of time in itself would suffice to deprive plaintiff of its valuable and most substantial rights in their entirety. As is said in 34 Cyc., p. 17, the appointment of a receiver is made by a Court of Equity, in the performance of one of its prerogative functions, in order to enable the Court to accomplish as far as practicable, *complete justice between the parties*. Assuming, as I am led to assume, the ownership of, and right to, the products of the lands in controversy herein by the Government of the United States, there would seem to be no doubt, in order, under the circumstances, that complete justice may be done as between the Government on the one hand and the defendants on the other, that receivers should be appointed, and injunctions in restrain of waste should be awarded, as the same have been prayed for.

Appropriate orders, embodying these conclusions, will be drafted by the Government's counsel.

BLEDSOE,

Judge.

APPENDIX

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Chap. 421.—An Act to authorize the President of the United States to make withdrawals of public lands in certain cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Sec. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided*



*further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry heretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

Approved, June 25, 1910.

No. 2660

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

EL DORA OIL COMPANY, J. L. CAMP-  
BELL, H. M. JACKSON and JOHN  
SHRADER, doing business under the firm  
name of OHIO VALLEY CONSTRUCTION COM-  
PANY, and JOHN SHRADER and T. J.  
GREEN,

*Appellants,*

vs.

THE UNITED STATES OF AMERICA,  
*Appellee.*

## MEMORANDUM OF AUTHORITIES

Cited on Oral Argument of A. L. Weil.

Filed this.....day of November, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.





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*Appellee.*

## MEMORANDUM OF AUTHORITIES

Cited on Oral Argument of A. L. Weil.

This is an appeal from an order appointing a receiver.

The one and only point that we desire to urge upon the attention of the court is whether or not the court below had jurisdiction to make this order.

It is our contention that as the bill of complaint in this case alleges that the defendants are in possession of the land the plaintiffs have an adequate remedy at law in ejectment.

We further urge that where the bill alleges that the defendant is in possession, equity has no jurisdiction of an action to recover possession or to remove a cloud or to quiet title, even though other relief be asked which is ordinarily of equitable cognizance, such as an accounting, an injunction or the appointment of a receiver.

The authorities are practically unanimous that a court of equity has no jurisdiction in such a case as this.

*Johnston v. Corson*, 157 Fed. p. 145.

This was an action by plaintiff against defendant in possession to remove cloud, for an accounting, for an injunction against mining and to compel surrender of possession.

The allegations of the bill showed the defendants to be naked trespassers.

This court through Hunt, D. J., reviewed the authorities at great length and said:

“Where there is a legal title and one who holds it is kept out of possession by defendants holding adversely, the remedy is at law to recover possession. ‘Equity in such cases has no jurisdiction unless its aid is required to remove obstacles which prevent a successful resort to an action in ejectment, or when, after repeated actions at law its jurisdiction is invoked to prevent a multiplicity of suits or there are other specific equitable grounds of relief.’ \* \* \* That ejectment ordinarily affords ample remedy to recover mesne profits cannot be disputed, that it affords ample remedy to recover possession cannot be disputed; and

that damages can be recovered in ejectment is also certain." \* \* \*

"It is well established that where a plaintiff is not in possession and defendant is, a suit to quiet title is not within the jurisdiction of a court of equity where other relief as well is sought, and this is true even though a number of additional reliefs is sought, part of which may be included within the jurisdiction of equity."

"Manifestly the principal issue involved in the case and the one which should be tried first is right of possession against defendants in possession, and defendants have a right to stand on their possession until compelled to yield to better title and to demand trial by jury as to whether plaintiff has a true title."

In

*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. p. 4.

The suit was to restrain waste in removing oil, to quiet title and for a receiver. It was held that ejectment was the proper remedy, the acts charged in the bill being such as necessarily to imply an actual possession or occupancy of the land by defendant.

In

*Lawson v. U. S. Mining Co.*, 207 U. S. p. 9,  
it was held that a state statute

"cannot be relied upon to sustain a bill in equity by one out of possession against one in possession for an action at law in the nature of ejectment affords perfectly adequate legal remedy."



See also

*Black v. Jackson*, 177 U. S. 349, 361.

In

*Boston & Montana Consolidated Mining Co.  
v. Montana Ore Purchasing Co.*, 188 U. S.  
632,

the bill alleged that defendants entered plaintiff's lands and removed ore, and asked for an accounting and an injunction against continuing trespasses. The court said:

“A bill of peace or to quiet title is defective because there is no allegation that the complainant was in possession which is necessary in such a bill. If not in possession an action of ejectment would lie.”

On the issue of jurisdiction on the ground of multiplicity of actions we refer to

*McGuire v. Pensacola City Co. et al.*, 105 Fed.  
677, 679 (5th C. C. A.)

in which it was held:

“If defendants are trespassers having obtained possession by force or violence as alleged they may all be joined as defendants in one action of ejectment. But even if a number of suits were required to settle the controversy as to the lands, each defendant would have the right to submit his claim of title and right to possession to a jury.”

The only question that remains for discussion is whether this universally accepted rule is changed by the circumstance that the government is plaintiff.

No theory of constructive possession following the legal title can avail in an action where actual possession is alleged to be in the defendants. The fact that the United States is the plaintiff does not alter the general rule of law above referred to. The United States, when it comes into court as a litigant stands on exactly the same footing as any other litigant, and is subject to the same rules of procedure unless otherwise provided by special statutory enactment.

In

*Hemmer v. U. S.*, 204 Fed. 901,

the court said:

“In a suit in equity the claims of the government appeal to the conscience of the chancellor with no greater or less force than those of a private individual under similar circumstances.”

*Central Trust Co. v. Treat*, 192 Fed. 942.

“When the United States sues or consents to be sued even in its own courts, it becomes a litigant and is to be treated like any other litigant except where it is otherwise provided by law.”

*U. S. v. Stinson*, 197 U. S. 200.

“The government is subject to the same rules respecting the burden of proof, the quantity and character of the evidence, the presumptions of law and of fact that attend the presentation of a like action by an individual.”

*State of Iowa v. Carr*, 191 Fed., p. 266.

“When a sovereignty submits itself to the jurisdiction of a court of equity and prays its

aid, its claims and rights are judicable by every other principal and rule of equity applicable to the claims and rights of private parties under similar circumstances.”

*U. S. v. Devereaux*, 90 Fed. 186.

“When a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied and bind all parties.”

In *U. S. v. Wilson*, 118 U. S. 86, the government was denied the right to maintain a bill *quia timet* or to remove cloud where not in possession.

Cf. *U. S. v. Bitter Root Dev. Co.*, 200 U. S. 451  
(Below 133 Fed. 278),

where it was charged that numerous defendants had cut timber and the court held that a multiplicity of defendants could not deprive each of his right to a trial by jury.

The decision upon which the complainants rely is found in *Coosaw Mining Co. v. State*, 144 U. S. 550.

In this case the Coosaw Mining Company was mining phosphates in the bed of a navigable stream under a license which required the payment of a royalty.

By reference to the terms of the injunction in the court below (47 Fed. 226) it will be seen that it merely restrained defendant from mining until it had taken out a new license under the act of the State of South Carolina of 1890.



There was no allegation of possession or right of possession in the defendant. On the contrary, it was expressly alleged that defendant was not in possession.

Obviously, the phosphates which were being mined, being in the bed of a navigable stream, there could be no possession in defendant or any other private party. The defendant was a mere licensee.

It is this that completely distinguishes the case from those in which the defendant is alleged to be or is in fact in possession, as in the case at bar.

In the Coosaw case there was no prayer for possession or to quiet title. Nor was it urged on the part of defendant that a court of equity had no jurisdiction, because the defendant was in possession but because damages would be an adequate remedy.

Thereupon the court took jurisdiction of the case on the ground of waste, public nuisance, purpresture.

A purpresture is the enclosure of that which should be open to the public at large. Obviously, this is not the ground of complaint in the case at bar. The plaintiff not only contends that the defendant should not be permitted to remain in the possession of these lands, but that no one at all may enter thereon. A public nuisance it cannot be, because there are no allegations to the effect that it is a public nuisance. The question as to whether it constitutes waste or not is ancillary to the primary

question whether the plaintiff or the defendants are entitled to the possession. In the usual action to restrain waste, it is assumed that the defendant is entitled to the possession either as a tenant for years or for life, or as a licensee, but that he is acting contrary to the covenants or conditions under which he holds his estate. An action cannot be brought to restrain waste in a court of equity where there is a contest over possession.

The question whether the defendants in this case are committing waste or not is absolutely dependent on whether the defendants are entitled to the possession or whether plaintiff is entitled to possession. If defendants are entitled to possession free of any right of plaintiff, nothing which the defendants do on the land can constitute waste.

The fundamental question in this case therefore is, Are the defendants entitled to the possession which it is alleged they now hold? And this question under all the authorities whether the government be plaintiff or not should be tried in a court of law with a jury, if defendants demand it.

The case does not belong on the equity side of the court and the court had no jurisdiction to appoint the receiver.

None of the other authorities presented by the plaintiff in any way sustain the points for which they are cited. There is no case which holds that an action in which a plaintiff out of possession seeks relief which involves the transfer of the possession

to him as the result of the suit is one of equitable cognizance.

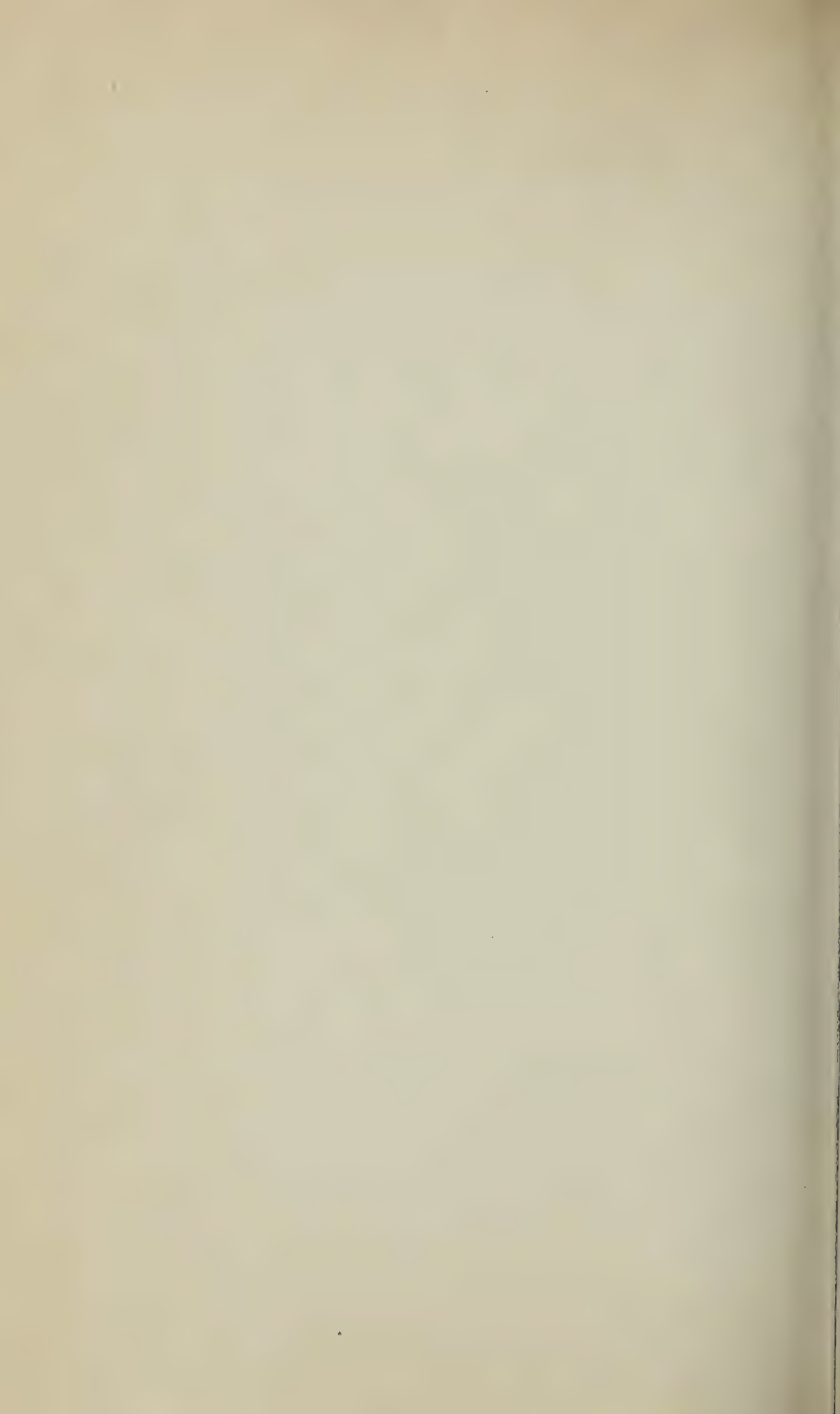
Counsel's contention that the government may sue in equity to restrain waste or to enforce some public policy as to the public lands assumes in favor of the government the very point before the court for decision, to wit, are these still public lands or do they belong to defendants?

We do not contend that the government is without remedy as learned counsel seems to think. If plaintiff is entitled to the possession of this land an action may be brought in the proper forum or this case may be transferred to the law side and the rights of the parties there adjudicated. If there is any danger that the *corpus* of the property may be destroyed while the action at law is pending, there is ample authority permitting an ancillary suit in equity for an injunction or the appointment of a receiver as the circumstances may warrant.

But the ultimate question of the right to the possession of the land must be tried in an action at law.

By following this procedure, the rights of the government would be amply protected, and at the same time, the defendants will not be deprived of their constitutional rights of a trial by jury.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a  
Corporation, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation, Bankrupt.

---

**Petition for Revision**

Under Section 24b of the Bankruptcy Act of Congress, Approved  
July 1, 1898, to Revise, in Matter of Law, an Order of  
the United States District Court for the  
Western District of Washington,  
Southern Division.

---

**Filed**

JAN 13 1916

**E. D. Monckton,**  
Clerk.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a  
Corporation, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

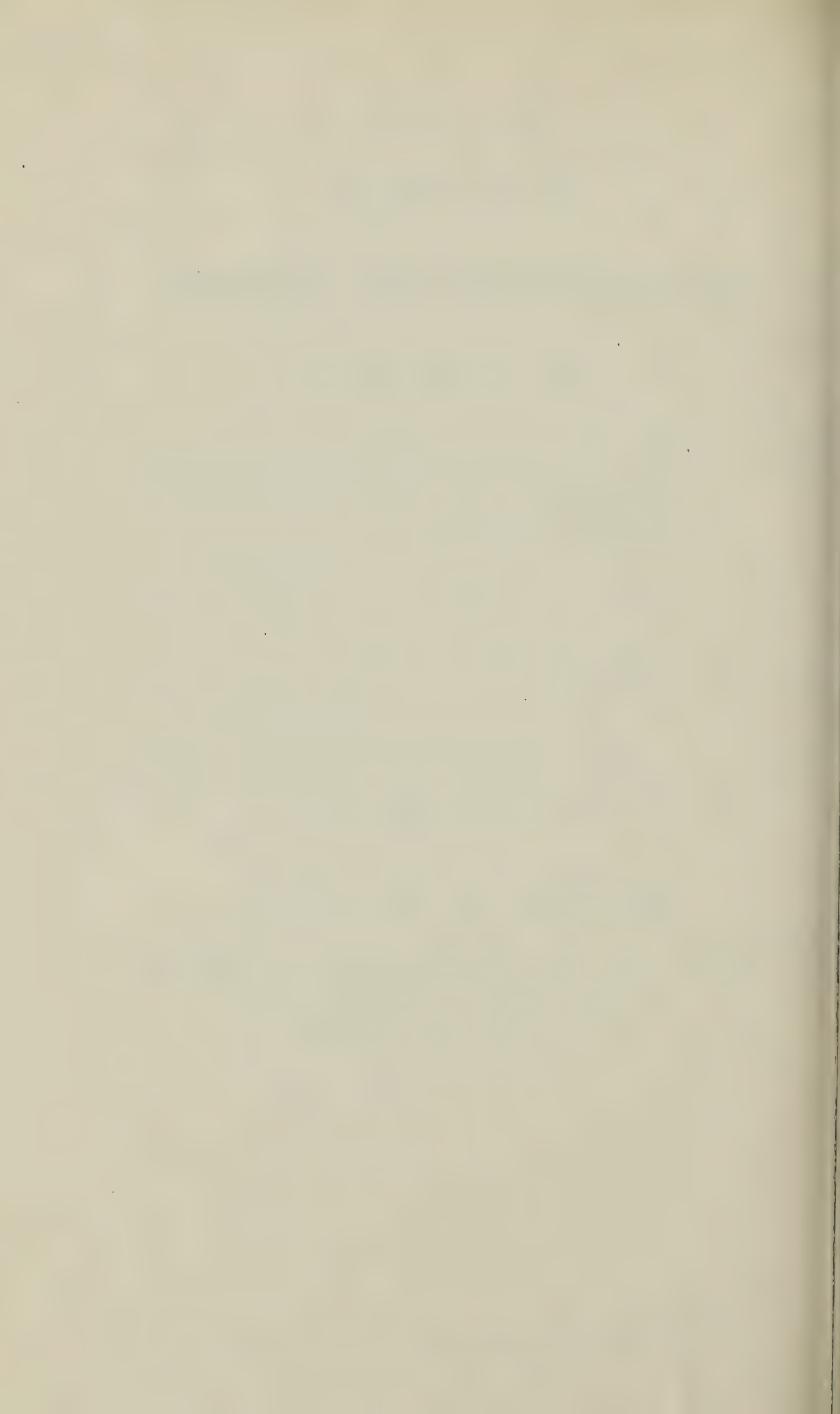
In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation, Bankrupt.

---

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

IN BANKRUPTCY—No. 1699.

In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation,

Bankrupt.

**Petition [for Revision].**

To the Honorable Judges of the United States Cir-  
cuit Court of Appeals for the Ninth Circuit:

Your petitioner respectfully shows:

That he is the duly elected, qualified and acting trustee in bankruptcy of the above-entitled estate; that he resides at Aberdeen, Washington; that said bankrupt was so adjudged by the above-entitled court on the 21st day of November, 1914.

That after such adjudication the following proceedings were had in the case of said bankrupt:

Immediately following the order of reference a claim was filed by Chehalis County, Washington, for unpaid, due and delinquent taxes against the property of said estate, in the sum of \$452.15, together with accrued interest.

That thereafter, there was filed by F. R. Archer, a claim in the sum of \$256.00, which sum represented the amount allowed said Archer by the Superior Court of Washington for Chehalis County, for his services and expenses as receiver in the State Court prior to the adjudication of bankruptcy, which services being for necessary work and labor in the preservation of said estate prior to bankruptcy; that said services were so performed within four months

prior to the adjudication of said bankruptcy.

That thereafter, upon application of the trustee, W. H. Tucker, Referee, at Aberdeen, Washington, made an order disbursing all of the funds in the hands of the trustee for the payment of the cost of the administration and attorneys' fees; that the total sum so disbursed was the sum of \$300.00, and that the said sum of \$300.00 was all the money received by the trustee during the administration of the trust, and that there were and are no other moneys or other assets belonging to said bankrupt estate.

Thereafter, the claimant, F. R. Archer, upon petitions for review before the Hon. Edward Cushman, judge of said court, brought up for hearing and disposition the question of the priority of the claim of the receiver in the State Court, and it was by the said Court decided and ordered that the claim of \$256.00 due the receiver in the State Court be entitled to priority of payment as against the cost of administration and attorneys' fees, and taxes due Chehalis County, Washington; that said memorandum decision by the said Hon. Edward Cushman was made and filed June 30th, 1915.

That thereafter, on the 31st day of July, 1915, the said W. H. Tucker, Referee, made an order disbursing to the said F. R. Archer, receiver in the State Court, the sum of \$256.20, and that thereafter and on the 25th day of October, 1915, the said order was approved and payment directed by the Hon. Edward Cushman, judge of the above-entitled court.

That said order was erroneous in manner of law in that:



The allowance made by the referee to the receiver in the State Court, is entieled to priority only as against general creditors, and that the expense of administration and taxes due Chehalis County, Washington, are a first and prior charge against the assets in the hands of the trustee.

WHEREFORE, your petitioner feeling aggrieved because of such order, asks that the same may be revised in manner of law by your Honorable Court, as provided in Section 24-B of the Bankruptcy Law of 1898, and the rules and practice in such payment provided.

W. B. PAINE,  
Petitioner.

State of Washington,  
County of Grays Harbor,  
City of Aberdeen,—ss.

W. B. Paine, the petitioner mentioned and described in the foregoing petition, do hereby make reference on oath: That the statements of fact therein contained are true and according to the best of my knowledge, information and belief.

W. B. PAINE.

Subscribed and sworn to before me this 27 day of October, 1915.

[Seal]

R. E. TAGGART,  
Notary Public for Washington, Residing at Aberdeen, Wash.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

IN BANKRUPTCY—No. 1699.

In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation,

Bankrupt.

**Notice [of Filing of Petition for Review].**

To F. R. Archer, Receiver, and to A. M. Wade, His  
Attorney of Record:

You, and each of you, will please take notice that I have this day sent to the clerk of the above-named court at the Federal Courthouse in the City of San Francisco, California, and will file with the said clerk the annexed petition of W. B. Paine, Trustee, for review by the above-named court of a certain order of the District Court of the United States for the Western District of Washington, Southern Division, filed in the office of the clerk of that court on the 25th day of October, 1915, confirming the report of W. H. Tucker, Referee, made on the 31st day of July, 1915, in pursuance and in conformity with a decision made by the Honorable Edward Cushman in the above-named District Court and filed June 30th, 1915.

Dated November 3d, 1915.

G. R. SNIDER,

Attorney for W. B. Paine, Trustee.

Service of copy of above notice together with copy of petition for review admitted at Aberdeen, Wash.,

this 3d day of November, 1915.

A. M. WADE,  
Atty. for F. R. ARCHER.

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[Endorsed]: No. 2676. United States Circuit Court of Appeals for the Ninth Circuit. W. B. Paine, Trustee in Bankruptcy of the Estate of Wishkah Logging Company, a Corporation, Bankrupt, Petitioner, vs. F. R. Archer, Receiver, Respondent. In the Matter of Wishkah Logging Company, a Corporation, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division.

Filed November 6, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a  
Corporation, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

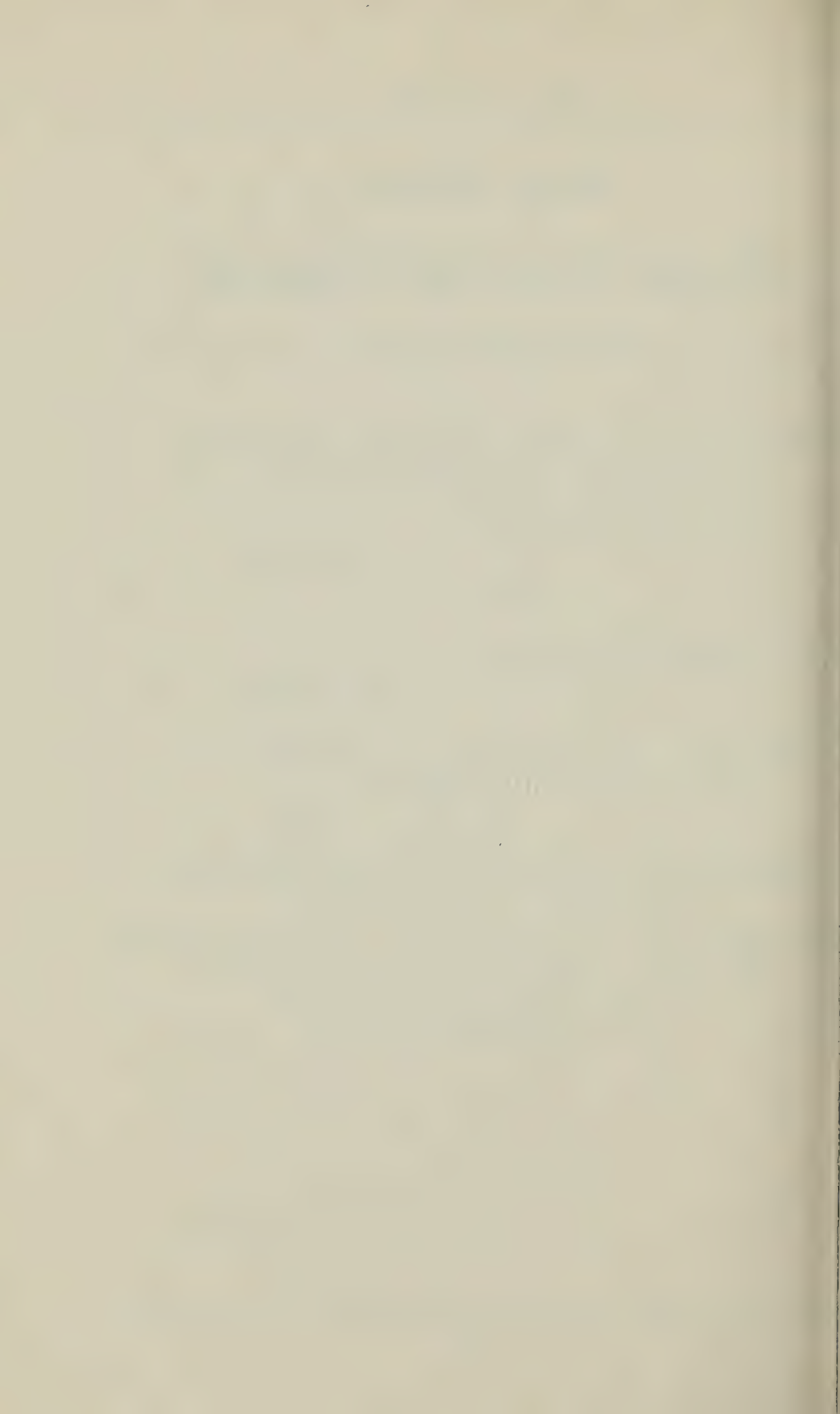
In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation, Bankrupt.

---

**TRANSCRIPT OF RECORD IN SUPPORT OF  
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress, Approved  
July 1, 1898, to Revise, in Matter of Law, an Order of  
the United States District Court for the  
Western District of Washington,  
Southern Division.

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**Names and Addresses of Attorneys.**

G. R. SNIDER, Esquire, Attorney, Aberdeen,  
Washington,

Attorney for Trustee and Petition herein.

AUSTIN M. WADE, Esquire, Attorney, Aberdeen,  
Washington,

Attorney for F. R. Archer, Receiver in the State  
Court.

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*In the United States District Court for the Western  
District of Washington, Southern Division.*

No. 1699.

In Re WISHKAH LOGGING COMPANY, a Cor-  
poration, Bankrupt.

**Praeceptum for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following  
to constitute the transcript of the record on review  
in the above-entitled matter, omitting therefrom all  
captions, indorsements, acceptances of service, veri-  
fications and file-marks:

1. Proof of claim of F. R. Archer, Receiver of  
the State Court, without any attached judgment or  
orders.

2. Claim of Chehalis County for taxes without  
bills and statements.

3. Report of trustee and petition for payment of  
cost of administration and attorneys' fees.

4. Order of referee approved by the Court disbursing funds.

5. Referee's certificate.

G. R. SNIDER,  
Attorney for Petitioner. [1]

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**Proof of Claim (of F. R. Archer).**

United States of America,  
County of Chehalis,  
State of Washington,—ss.

At Aberdeen in said State on the 1st day of April, A. D. 1915, came F. R. Archer of Aberdeen in the County of Chehalis and State of Washington, and made oath and says:

That the above-named bankrupt, the person by or against whom a petition for adjudication of bankruptcy has been filed was at and before the filing of said petition, and is still justly and truly indebted to him in the sum of \$256.20 *dollars* with interest from April 1st, 1915, at 6 per cent per annum; that the nature and consideration of said debt is as follows: A judgment of the Superior Court as per exhibit "A" attached filed herewith and made part hereof (or promissory notes, originals of which are filed herewith and made part hereof). That no part of said debt has been paid; that there are no set-offs or counterclaims to the same, and that claimant has not, nor has any person by his order, or to the knowledge or belief of said deponent, for claimant's use, had or received any manner of security for said debt whatever. That a judgment has been rendered

on said debt and is preferred.

F. R. ARCHER.

Subscribed and sworn to before me this 1st day of April, 1915.

[Seal] AUSTIN M. WADE,  
Notary Public in and for the State of Washington,  
Residing at Aberdeen.

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**Power of Attorney.**

To A. M. Wade.

The undersigned creditor of the above-named bankrupt, hereby authorizes you, to attend any and all meetings of creditors of the bankrupt aforesaid for and in the name of the [2] undersigned, to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the *of the* estate of said bankrupt; and for the undersigned to assent to such appointment of trustees; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and of money due the undersigned under any composition; and for any other purpose whatsoever in the interest of the undersigned, with full power of substitution.

In Witness Whereof, the undersigned has hereunto signed his name and affixed his seal the 1st day of April, A. D. 1915.

F. R. ARCHER.

State of Washington,  
County of Chehalis,—ss.

Before me, on the date below mentioned, came



F. R. Archer personally known to me to be the person who executed the foregoing power of attorney, who acknowledged said execution, and who upon his oath, says that he executed the same on his own behalf.

Sworn to and subscribed before me this 1st day of April, A. D. 1915.

[Seal] AUSTIN M. WADE,  
Notary Public in and for the State of Washington,  
Residing at Aberdeen.

(Filed Apr. 1, 1915.) [3]

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**Proof of Claim [of Chehalis County for Taxes].**

United States of America,  
County of Grays Harbor,  
State of Washington,  
District of Washington,—ss.

At Aberdeen in said District and State on the 16th day of July, A. D. 1915, came J. E. Stewart of Aberdeen, in the County of Grays Harbor and State of Washington, and made oath and says:

That he is treasurer of the . . . . ., a corporation, incorporated by and under the laws of the State of . . . . ., and carrying on business at . . . . ., in the County of . . . . ., and State of . . . . ., and that he is duly authorized to make this proof.

That he is one of the firm of . . . . . consisting of himself and . . . . . of . . . . . in the County of . . . . . and State of . . . . .

That he is the attorney (or authorized agent) of Grays Harbor County, in the County of Grays Harbor and State of Washington.

That the above-named bankrupt, the person by or

against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and is still justly and truly indebted to . . . . . Grays Harbor County in the sum of \$499.15 dollars, with interest from . . . . . 19.., at .. per cent per annum; that the nature and consideration of said debt is as follows: Taxes. That no part of said debt has been paid; that there are no offsets or counterclaims to the same, and that claimant has not, nor has any person by his order, or to the knowledge or belief of said deponent, for claimant's use, had or received any manner of security for said debt [4] whatever. That no judgment has been rendered on said debt nor has any notice been received for such account; that said claim constitutes a lien against the property of the above estate and claimant is entitled to priority of payment.

J. E. STEWART.

Subscribed and sworn to before me this 16th day of July, 1915.

[Seal]

W. H. TUCKER,

Notary Public in and for the State of Washington,

Residing at Aberdeen.

(Marked "Preferred #1.")

(Attached to this are bills and statements.) [5]

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### **Petition for Payment of Fees.**

Comes now W. B. Paine, the duly appointed, qualified and acting trustee in the above-entitled matter and represents to the Court as follows:

I.

That there is coming to his hands as such trustee,



the sum of \$300 and no more, and that there are no other moneys or assets belonging to said estate or which will come into said estate or into the hands of said trustee.

## II.

That since the adjudication of bankruptcy, and up to the present time, G. R. Snider, the attorney for the trustee, has performed valuable services for your petitioner, all as particularly set out in the subjoined affidavit of said G. R. Snider.

WHEREFORE, your petitioner prays for an order of court directing him to pay out of the funds now in his hands, the cost of administration and an attorney's fee equal to the amount remaining in the hands of your trustee after the payment of other costs of administration.

W. B. PAINE,  
Trustee.

State of Washington,  
County of Chehalis,—ss.

G. R. Snider, being first duly sworn on oath says that he is now and has been attorney for W. B. Paine, trustee of the Wishkah Logging Company, Bankrupt, since the appointment of W. B. Paine as such trustee and that as such attorney he has had charge of all the affairs of the bankrupt and has personally administered said estate with the consent and approval of said trustee. That upon direction of this Court affiant prepared and made a special appearance in the Superior Court of Washington for Chehalis County in the case of Anthony Semion vs. Big Creek Driving [6] Company et al., and



argued the matter to the said Court on two different occasions and obtained a favorable ruling, which ruling effected the discharge of the receiver appointed in said action and vested in the trustee all the assets of Wishkah Logging Company. That as attorney for said trustee affiant answered and contested the foreclosure of three mortgages by Hayes & Hayes, bankers, in an action in the Superior Court of Washington for Chehalis County entitled Hayes & Hayes, Bankers, vs. Wishkah Logging Company et al. That affiant raised all questions which had been previously raised by the receiver of said company, which were many and involved and spent a great deal of time in preparation for the trial of said action; that said action was tried in said court and consumed a day; that upon said trial a decree of foreclosure was entered. That in said action affiant also disputed and contested a claim of lien by the Big Creek Driving Company in the sum of \$10,500 and in its decision thereon the Court allowed a lien in the sum of \$300.

That the assets of said bankrupt consist of the sum of \$300 in cash, which sum was received on the sale of certain personal property, and that said sum together with a claim of \$40 for an overpayment of the Federal Corporation Tax is all the money or property coming into the hands of said trustee and that there are no other assets. That certain fees in the Superior Court have been paid therefrom, office rent and publishers fees, filing fees in the above-entitled court and an attorney's fee to the attorney for the petitioning creditors have been paid and that

after the payment of all necessary expenses there will remain less than \$200; that said sum will not fully recompense affiant for his services and that said sum is a very reasonable [7] one to be allowed therefor; that the indebtedness of said bankrupt is about \$160,000 which is represented by a very large number of claims and that any payment or dividend made from the assets above set out would be but a few cents upon each claim; that the principal creditor, Hayes & Hayes, bankers, is willing that the remaining sum be set aside to affiant as an attorney's fee.

G. R. SNIDER.

Subscribed and sworn to before me this 26th day of March, 1915.

[Seal]

R. E. TAGGART,

Notary Public for the State of Washington, Residing at Aberdeen.

(Filed March 26, 1915.) [8]

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**Order [of Referee Approved by the Court Disbursing Funds].**

The above matter coming on to be heard upon the application of counsel for F. R. Archer, for an order distributing and paying to the said F. R. Archer out of the funds now in the hands of the trustee of the said bankrupt estate, the sum of \$256.20, as per his claim made and filed herein, and in accordance with the opinion of the District Court made and entered in said cause, and it appearing to the satisfaction of the Court that the said application should be granted;

NOW, THEREFORE, in consideration of the premises and in conformity with the said opinion of the said District Court, it is ORDERED AND ADJUDGED that the said trustee of the said bankrupt estate, W. B. Paine, be, and he is hereby ordered and directed to pay to the said F. R. Archer, upon his claim made and filed herein against the said bankrupt estate, the sum of \$256.20, out of the money in the hands of the said trustee, belonging to the said estate.

Dated this the 31st day of July, 1915.

W. H. TUCKER.

The above order is approved, and let payment be made as therein directed.

Dated this the 25th day of Oct., 1915.

EDWARD E. CUSHMAN,

Judge.

(Filed Oct. 25, 1915.) [9]

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### **Referee's Certificate.**

This is to certify, That the following items were allowed by me as expense and costs of administration:

Trustee's fees .....	\$ 18.00
Hogan & Graham, Attorneys, filing fee .....	25.00
Hogan & Graham, Attorneys, fee, filing petition .....	50.00
Aberdeen World, publication.....	15.00
Appearance fee, Superior Court...	6.00
Stenographic fees.....	2.00
Referee's fees .....	19.10



G. R. Snider, Attorney's fee for	
Trustee .....	139.90
Coats Fordney Co., office rent.....	25.00

---

Total.....\$300.00

That the said sums allowed exhaust all of the funds in the hands of the Trustee.

W. H. TUCKER,  
Referee in Bankruptcy. [10]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return, that the foregoing pages numbered from 1 to 10 inclusive, contain a full, true and correct transcript of proceedings and record in the case of Wishkah Logging Company, a corporation, Bankrupt, No. 1699, pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this office at the City of Tacoma, in the District aforesaid.

I further certify that I hereto attach and herewith transmit the original order to show cause.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees, and charges incurred and paid into my office, by and on behalf of the petitioner herein, for making the rec-

ord certificate and return to the United States Circuit Court of Appeals, for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making  
 record, certificate and return, folios @  
 15¢ ea. . . . . 2.55  
 Clerk's certificate to transcript, 3 folios @  
 15¢ ea. . . . . .45  
 Seal to said certificate. . . . . .20

Attest my hand and the seal of the United States District Court for the Western District of Washington, at Tacoma, this sixth day of November, A. D. 1915.

[Seal]

FRANK L. CROSBY,  
 Clerk.

By E. C. Ellington,  
 Deputy Clerk.

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*In the United States District Court, Western District  
 of Washington, Southern Division.*

IN BANKRUPTCY—No. 1699.

In the Matter of WISHKAH LOGGING COM-  
 PANY, a Corporation,

Bankrupt.

**Order [Directing That Order of District Court be  
 Revised in Matter of Law, etc.].**

WHEREAS, application has been made for revision in matter of law by the Circuit Court of Appeals of the Ninth Circuit of the United States of the order entered herein on the 25th day of October, 1915, and the Court being satisfied that the question there de-

terminated is one of which revision may be asked as provided in Section 24-B of the Bankruptcy Law of 1898, and that the application should be granted.

On motion of G. R. Snider, Esq., attorney for the petitioner, it is ordered:

That the order of this Court made and entered herein on the 25th day of October, 1915, be revised in matter of law by the Circuit Court of Appeals of the Ninth Circuit of the United States as provided by Section 24-B of the Bankruptcy Law of 1898, and the rules and practice of that court.

That the clerk within 30 days from this date prepare, at the expense of the petitioner, a certified copy of such order and of the records of this case pertinent to such order, and file the same with the clerk of such Circuit Court of Appeals.

WITNESS the Hon. EDWARD CUSHMAN, judge of said court, and the seal thereof, at the city of Tacoma in said district, on the 28th day of October, 1915.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 28, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.



[Endorsed]: No. 2676 United States Circuit Court of Appeals for the Ninth Circuit. W. B. Paine, Trustee in Bankruptcy of the Estate of Wishkah Logging Company, a Corporation, Bankrupt, Petitioner, vs. F. R. Archer, Receiver, Respondent. In the Matter of Wishkah Logging Company, a Corporation, Bankrupt. Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division.

Filed November 22, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer.  
Deputy Clerk.



United States  
Circuit Court of Appeals

For the Ninth Circuit

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W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a  
Corporation, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

---

In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation, Bankrupt.

---

Brief of Petitioner on Petition  
for Revision

Under Section 24b of the Bankruptcy Act of Con-  
gress, Approved July 1, 1898, to Revise, in Matter  
of Law, an Order of the United States District  
Court for the Western District of Wash-  
ington, Southern Division.

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G. R. Snider,  
T. B. Bruener,  
Aberdeen, Washington,  
Attorneys for Petitioner.

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Filed  
World Press

FEB 17 1916

E. D. Montfort





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a  
Corporation, Bankrupt,  
Petitioner,

vs.

F. R. ARCHER, Receiver,  
Respondent.

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In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation, Bankrupt.

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**Brief of Petitioner on Petition  
for Revision**

Under Section 24b of the Bankruptcy Act of Con-  
gress, Approved July 1, 1898, to Revise, in Matter  
of Law, an Order of the United States District  
Court for the Western District of Wash-  
ington, Southern Division.

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**G. R. Snider,**  
**T. B. Bruener,**  
Aberdeen, Washington,  
Attorneys for Petitioner.

**STATEMENT OF CASE.**

On November 21, 1914, petitioner, Wishkah Log-  
ging Company was adjudged a bankrupt in the Dis-

district court of the United States for the Western District of Washington, Southern Division. Prior and within four months to such adjudication and in the Superior Court of Washington for Grays Harbor County, F. R. Archer, Respondent, was appointed Receiver of the Wishkah Logging Company. On April 1st, 1915, said F. R. Archer, as Receiver in the state court filed his proof of claim in the sum of \$256.20 (Tr. pp. 10-11). Subsequent to the adjudication, and on the 16th day of July, 1915, Grays Harbor County, by its Prosecuting Attorney, filed a proof of claim for taxes in the sum of \$499.15 (Tr. pp. 12-13). There came into the hands of the Trustee of said petitioner, the sum of \$300.00 (Tr. pp. 13-14). Thereafter upon the petition of the Trustee of said bankrupt, the Referee in Bankruptcy, W. H. Tucker, allowed as expenses and costs of administration various amounts, to-wit: the entire amount of the fund which came into the hands of the Trustee (Tr. pp. 17-18). Thereafter, and upon petition for review to the District Court for the Western District of Washington, Southern Division, the claim of F. R. Archer, as Receiver in the State court, in the sum of \$256.20, was allowed as a prior and a first charge against the assets in the hands of the Trustee (Tr. pp. 16-17).

It will be seen that the allowance to the Receiver in the state court practically exhausts the entire fund in the hands of the Trustee, and leaves for distribution by the bankruptcy court for expense and costs of administration only the sum of \$43.80. It further



appears from the record that the sum allowed by the Referee in the first instance (Tr. pp. 17-18) will exhaust the entire fund, and will leave nothing for the payment either of taxes or the expenses and claim of the Receiver in the state court.

The question is then squarely presented: Does the claim of the receiver in the state court for services beneficial to the estate and rendered within four months of the adjudication of bankruptcy have priority of payment to either taxes legally due and owing, or expenses and costs of administration of the bankruptcy court?

If this question is answered in the affirmative, then the judgment of the lower court is correct; if in the negative, then the judgment should be reversed.

The taxes for which claim is made by Grays Harbor County were due, unpaid and delinquent on property of the bankrupt on and prior to its adjudication as a bankrupt.

The fund was created by a sale in the bankruptcy court, and has never been in possession of the Receiver.

The payment of either taxes or costs of administration will exhaust the fund and the payment of the Receiver's claim will leave less than enough to pay the filing fee, so that the question of priority is squarely before the court in this case.

### **ASSIGNMENT OF ERROR.**

The Court erred in decreeing the claim of the receiver in the State Court superior to taxes.

The Court erred in decreeing the claim of the receiver in the State Court superior to the costs and expenses of administration in the Bankruptcy Court.

### ARGUMENT.

The lien of the Receiver was annulled by reason of the adjudication of bankruptcy.

Sec. 67 F, Bankruptcy Act 1898.

“The appointment of a Receiver for an insolvent was an act of bankruptcy, (Sec. 3 (4) Bankruptcy Act 1898, Amended 1903), and it could not have been intended that the very act which put the insolvent into bankruptcy should withdraw the property from distribution.”

Randolph vs. Scruggs, 10 Am. Bank. Rep. 1.

State courts do not have concurrent jurisdiction with courts of bankruptcy.

In re Watts & Sacks, 190 U. S. 1.

Loveland on Bankruptcy, 4th Ed. p. 145.

U. S. Fidelity & Guaranty Co. vs. Bray, 225

U. S. 205; 28 Am. Bank. Rep. 207.

The receiver in a state court presents his claim and proves the same as a general creditor and asks that it be preferred. He has only a PROVABLE debt entitled to priority over general creditors.

Randolph vs. Scruggs, 10 Am. Bank. Rep. 1;  
190 U. S. 533.

Loveland on Bankruptcy, 4th Ed. p. 145.

In re Rogers, 83 Am. Bank. Rep. 723.

In re Standard Fullers Earth Co. 26 Am.  
Bank. Rep. 563.

In re Amoris, 24 Am. Bank. Rep. 567.

In re Goldberg, 16 Am. Bank. Rep. 521.

In re Sage, 35 Am. Bank. Rep. 456 (Advance Sheets).

Section 64, Sub-sections A and B, 1, 2, 3, 4 and 5 set out what claims have priority, and the order of payment. The claim of the Receiver in a state court is placed in Sec. 64 B5.

Collier on Bankruptcy, 10th Edition, page 913.

Loveland on Bankruptcy, 4th Edition, page 1133.

5 Cyc. 386, Note 34, 1913 Cyc. Annotations to same.

Remington on Bankruptcy, Vol. 2, Sec. 2196.

If there is not sufficient funds to pay all priority debts the last class in order abates first.

Collier on Bankruptcy, 10th Ed. 887.

Hence, taxes and costs of administration will be paid before the claim of the Receiver.

Taxes must be paid first:

In re Grenard Lith. Co. 19 Am. Bank. Rep 744.

In re Wiseman, 24 Am. Bank. Rep. 150.

In re Prince & Walter, 12 Am. Bank. Rep 675.

In re Wenatchee Orchard Co. 32 Am. Bank. Rep. 369.

City of Chattanooga et al vs. Hill, 15 Am. Bank Rep. 195.

Guaranty Title & Trust Co. vs. Title Guaranty & Surety Co. 224 U. S. 152; 27 Am. Bank. Rep. 873.



Delahunt vs. County of Oklahoma, 35 Am. Bank. Rep. 157 (Advance Sheets).

Taxes must be paid regardless of security.

Remington on Bankruptcy, Sec. 2163.

“The tendency has been to construe sub-section ‘a’ as putting taxes in a different and really higher class than the debts enumerated in sub-section ‘b’; this is probably the law.”

Collier on Bankruptcy, 10 Ed. 889.

The trustee must pay taxes on exempt property:  
In re Tilden, 1 Am. Bank, Rep. 300.

In re Baker, 1 Am. Bank. Rep. 526.

The trustee must pay taxes on property relinquished:

Hecox vs. County of Teller, 28 Am. Bank Rep. 525.

Taxes must be paid on property which never came into the possession of the trustee:

City of Waco vs. Bryan, 11 Am. Bank. Rep 481.

A corporation tax due the state, there being no property in the state, is entitled to priority of payment.

New Jersey vs. Anderson, 203 U. S. 484.

Taxes must be paid out of the general fund, though the only one benefited is the mortgagee, purchaser, etc.:

Remington on Bankruptcy, Sec. 2147.

. The costs of administration, section 64, subdivision A. 1, 2, and 3, will be paid before the claim of the Receiver in the state court:

In re Rogers, 8 Am. Bank. Rep. 723.

In re Standard Fullers Earth Co. 26 Am. Bank. Rep 563.

Randolph vs. Scruggs, 10 Am. Bank. Rep. 1.

The court below based its decision on the cases of Randolph vs. Scruggs, *supra*, and in re Chase, 10 Am. Bank. Rep. 677. One of the questions involved in Randolph vs. Scruggs, was whether an assignee had a preference over general creditors, in fact that was one of the particular questions certified. The certificate in that case sets forth the following:

“The appellants asserted and claimed that each of said items constituted a prior charge upon the assets, and asked to have the same paid by the trustee **in preference to unsecured creditors.**”

This case must be considered in the light of this contention. It only goes so far as to hold that the claimant has a preference, **not a lien**, and as a preference it must be placed under Section 64b5. The precise question at bar was not considered or determined in that case.

In the Scruggs case it is held that the claim of a receiver for professional services prior to bankruptcy may be preferred in the right of an assignee or receiver as against general creditors, but in that case the court says:

“If by declaring the assignment an act of bankruptcy the statute means that the conveyance shall not be effectual against the bankruptcy proceedings, as is agreed, the natural and simple construction is that it means that the deed shall be voided as a whole when the trustee takes the goods. The cases which we have cited and others under solvent and bankruptcy laws, evidently take that view. **It follows that the appellant can assert no preference by way of lien under the deed.**”

The opinion in the Chase case, *supra*, was written, with the exception of the last paragraph or two, before the Scruggs case, *supra*, was decided, and the part so written is not in accord with that case and is against the weight of authority. It being held in the Chase case that the assignee had a lien under the deed, and *Louisville Trust Co. vs. Cominger*, 184 U. S. 18, is cited as so holding. The *Cominger* case only decided that an adverse claimant could not be disposed of summarily, but that there must be a suit to recover.

The case of *Standard Fullers Earth Company*, *supra*, involves all the features of the case at bar, except that it does not appear that the payment of either claim would exhaust the fund. The *Randolph* case was considered therein and held to support the opinion of the court that the cost of administration



must be paid before the claim of a receiver. Cases and authorities are exhaustively set forth.

If it be possible for the insolvent or the state court to incumber an estate within four months prior to the bankruptcy, as the lower court held in this case, the result would be to make the bankruptcy act a dead letter, ineffectual, and of no benefit to insolvents in estates so incumbered where there would not be sufficient additional funds to defray the costs of bankruptcy. It would be possible for every insolvent to charge his estate and possibly prefer a creditor by means of these costs and expenses in the state court.

It is the contention of the trustee in this petition, first, that the necessary expenses in the bankruptcy court are a first and prior charge against the assets and are superior to those incurred and fixed in the state court, and second, that in all events, taxes due the County of Grays Harbor must be first paid. There is some authority for the statement that the trustee is personally liable on his bond for taxes lawfully assessed and not paid, there being sufficient funds realized from the estate to discharge the taxes.

Matter of Monsarrat 25 Am. B. R. 820.

If the trustee's contention regarding the payment of the costs of administration and expenses of bankruptcy is not well taken, we are still firmly convinced that all authority holds that taxes are a first

charge and are prior and superior to any costs or expenses no matter where incurred.

For the reasons above set forth, we think the court above in error, and feel that the case should be remanded with instructions that the receiver's claim be adjudged junior to both taxes and costs and expenses in the Bankruptcy Court.

Respectfully submitted,

G. R. SNIDER. .

T. B. BRUENER.

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a Cor-  
poration, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

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In the Matter of WISHKAH LOGGING COMPANY,  
a Corporation, Bankrupt.

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Motion to Dismiss Petition for Revision

Filed

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FEB 26 1916

F. D. Monckton,  
Clerk.

AUSTIN M. WADE,  
Attorney for Respondent.  
Aberdeen, Washington

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United States  
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**Motion to Dismiss Petition for Revision**

AUSTIN M. WADE,  
Attorney for Respondent.  
Aberdeen, Washington

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**MOTION TO DISMISS.**

F. R. Archer, receiver, respondent, moves the  
dismissal of the petition for revision:

*First:* The record is totally incomplete. It  
lacks the decision of Judge Cushman deciding that  
the receiver's claim should be paid because of serv-  
ices in preserving the estate. There is no statement  
of the taxes claimed to be prior; no showing that

any claim for taxes was ever filed; the evidence on which the trial court acted has not been sent up.

*Second:* No assignment of errors was filed in the court below as required by rule eleven of this court; the transcript of the record, as printed, contains no assignment of errors.

*Third:* The trustee, petitioner, has no interest in whether the taxes are paid or not; Chehalis County does not complain.

*Fourth:* The petition for review was filed too late. The trial court on June 30, 1915, ordered the receiver's claim to be paid; the petition for review was not sued out until November 3, 1915. Trans. 4.

*Fifth:* The order to pay the receiver is based on findings of fact that the receiver preserved the estate; and no showing that the taxes were a charge, or a lien upon the estate.

## ARGUMENT.

The incomplete state of the record requires a dismissal of the petition to revise. The record does not show that the alleged tax claim was ever presented to the trial court. The decision ordering payment of the receiver's bill was rendered on June 30th, 1915, Trans. 16. The tax claim was sworn to on July 16, 1915, 16 days later. Trans. 12-13. There is nothing in the record to show this tax claim was presented, or acted on, either allowed or disallowed.



The claim for taxes, as printed, Trans. 13, is incomplete. The "bills and statements" are not attached.

No exceptions were taken to Judge Cushman's decision of June 30, 1915, Trans. 16, nor to the order of the referee based thereon on July 31st, 1915, nor the court's approval thereof on October 25th, 1915. Trans. 16-17.

The issue tried out below was whether the receiver preserved the property. The court decided this by a memorandum decision, which probably is printed in the Federal Reporter, although we have been unable to find it. This decision bears date June 30th, 1915. (See petition for revision, Trans. 2).

The record is intentionally incomplete. The precipe for transcript shows petitioner did not desire a complete record. It asks for:

*"Two, claim of Chehalis County for taxes, without bills and statements."*

Why without "bills and statements?" The obvious answer is that the tax claim is for taxes on *other property*. It is clear that there would not be a claim for taxes in the sum of \$499 assessed against a fund of \$300. The other property was mortgaged property to which the trustee disclaimed any interest.

*In re O'Connell*, 137, Fed. 838.

*Landry vs. San Antonio Brewing Ass'n.* 159 Fed. 700.

*Gaudette vs. Graham*, 164 Fed. 311.

## UPON THE MERITS.

The case cited by petitioner that a claim for taxes is prior to receiver's fees lacks application. The taxes claimed were assessed against other property, not involved in this case—property which passed to the mortgagee, Hayes & Hayes, long prior to bankruptcy. Doubtless it was for this reason that petitioner did not desire a statement of the taxes in the record. The trial court allowed the receiver's bill as a prior claim on June 30, 1915; the claim for taxes was sworn to 16 days later. The record does not show any action thereon whatever.

The petition which is assumed to be the basis for the hearing in the trial court, was that the fund in question be paid to the trustee's attorney for services. Trans. 13. Said petition is supported by the affidavit of G. R. Snider, which discloses no taxes due on the fund in question, but it does show that three mortgages had been foreclosed against other property. This petition is the only one in the record, on the subject of receiver's charges.

The taxes upon the disclaimed property follows the property and should not be paid by the trustee.

In re *Hollenfeltz*, 94 Fed. 629.

In re *Stalker*, 123 Fed. 961.

In re *Garry*, 112 Fed. 958.

2 Remington, *Bankruptcy*, Sec. 2148.



Since the claim for taxes was filed after the decision of Judge Cushman complained of, and such claim was never allowed by the trustee, or the court, and Chehalis County never took an order upon its claim, and has prosecuted no appeal, this court should not, at the instance of the trustee, reverse the order allowing F. R. Archer his receiver's costs and expenses.

Chehalis County never urged its claim in the trial court, and is not appealing, hence court should deny the petition. The true reason the county is not complaining, is that in the trial court, a certificate of the county treasurer was filed, showing that all the taxes upon the property which came into the hands of the trustee, and which he held, had been paid. This is part of the record which the petitioner has doubtless intentionally omitted.

“If beneficial services are allowed, for, they are to be regarded as deductions from the property which the assignee is required to surrender and in that way the gain a preference, *Platt v. Archer*, 13 Blatchf., 351; *In re Scholtz*, 106 Fed. 834; *White v. Hill*, 148 Mass., 396; *Clark v. Sawyer*, 151 Mass., 64.” (*Randolph vs. Schruggs*, 190 U. S. 533 at 539) *In re Chase*, 124 Fed., 753.

Absolutely all that there is to predicate error upon in the record as presented by petitioner, is the bare fact that after a decision by the trial court,



allowing Archer \$256.20 as receiver's fees and costs, a claim was sworn to 16 days later for general taxes. This claim for taxes, incomplete in form, omitted a statement of the taxes, or of the property upon which same is assessed, is found upon page 12 of the transcript. Whether this claim was ever filed or ever allowed, the record is silent. The only question which the petitioner can assert on this appeal is this: Does the mere fact that a claim was filed, after a decision is rendered, show that such decision is erroneous. It is respectfully urged that the motion to dismiss should be granted; in any event, the matters complained of should be affirmed.

Respectfully submitted,

AUSTIN M. WADE,

Attorney for Respondent.

Aberdeen, Wash.

NO. 2676

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**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit**

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W. B. PAINE, Trustee in Bankruptcy of the Estate  
of WISHKAH LOGGING COMPANY, a  
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In the Matter of WISHKAH LOGGING COM-  
PANY, a Corporation, Bankrupt.

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**Reply Brief**

Under Section 24b of the Bankruptcy Act of Con-  
gress, Approved July 1, 1898, to Revise, in Matter  
of Law, an Order of the United States District  
Court for the Western District of Wash-  
ington, Southern Division.

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G. R. Snider,  
T. B. Bruener,  
Aberdeen, Washington,  
Attorneys for Petitioner.

Filed

FEB 28 1916

F. D. Monckton





United States  
Circuit Court of Appeals

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G. R. Snider,  
T. B. Bruener,  
Aberdeen, Washington,  
Attorneys for Petitioner.

REPLY BRIEF.

We deem it necessary to make a short reply to  
the motion to dismiss which has been filed by the  
respondent, F. R. Archer. The points or reasons

upon which he asks a dismissal will be taken up in this brief in the order in which they appear in the motion.

It is first set forth that the record or transcript is totally incomplete, first, in that the decision of Judge Cushman is not contained therein; second, that there is no itemized statement of taxes; third, that no claim for taxes ever was filed; fourth, that there is no evidence or testimony sent up.

The order sought to be reviewed, which is the final order in this matter, appears on pages 16 and 17 of the transcript on file. The opinion of Judge Cushman is not necessary to this petition and, furthermore, it is a decision of which this court will take judicial notice. While there is no itemized or particular statement of taxes claimed, yet the claim of the county appears in full on pages 12 and 13 of the transcript, and the purpose of petitioner in omitting the voluminous statements was solely to avoid greater expense to the fund which is practically exhausted by the order we now seek to review. It will be noted that in the precept for transcript, all file marks were requested omitted. It must be the lack of file marks to which respondent takes objection, when he states that "no showing that any claim for taxes was ever filed." It is our understanding of the practice that transcripts may be made in this manner, and it is very apparent that this claim for taxes must have been part of the record to appear in the transcript as it does. Naturally, there is no testimony, or evidence sent up

inasmuch as this is a petition for revision under section 24b of the Bankruptcy Act, and is purely a question of law.

Respondent sets out, secondly, that no assignment of errors was filed, and that the transcript contains no assignment of errors.

Under the practice in such a procedure as this, no assignments of error other than those contained in the petition for revision are required. The Court will note, however, that in our petition for revision on pages 2 and 3, of the transcript, we particularly set forth two assignments of error.

As a third ground for dismissal, the respondent states that the petitioner, the Trustee, has no interest in whether or not the taxes are paid, and that Chehalis County, which claims the taxes, is not complaining. The Trustee has the duty and is obliged to administer this estate, and in some way discharge all claims filed. It is therefore the duty of the Trustee to see that all claims are justly handled, and that those having priority receive payment. As intimated in our opening brief, the Trustee may be held liable for interest and penalty on unpaid taxes if he has funds in his hands to discharge the same. The very fact that Chehalis County (Grays Harbor County, as it is now called) has filed in the bankruptcy court its claim for taxes, is an action susceptible of but one construction, and that is, that it claims these taxes and demands payment thereof as a priority. It will be noted that the claim for taxes has been endorsed "Preferred No. 1".



Respondent next sets forth that our petition for revision was filed too late. There is no statutory limit fixed, within which time a petition must be filed. While it is true that Judge Cushman rendered his decision on June 30th, 1915, yet the order by the referee for the payment of the fees to the receiver, the respondent herein, was not made and approved until October 25, 1915, and our petition for revision was made October 27th, 1915, (Tr. p. 3). Under these facts, it seems that we were as expeditious as possible in perfecting this petition. And under all the authorities, if our time began to run from June 30th, 1915, we are still within the time allowed by the court.

As a next ground for dismissal the respondent sets forth that the order to pay the receiver is based on the findings of fact that the receiver preserved the estate, and that there is no showing that taxes claimed were a charge or a first lien upon the estate. We admit, and particularly set forth in our petition for revision that the services of the receiver were beneficial, yet as a matter of law are junior to costs of administration and taxes. The incorporation in the transcript of the claim for taxes, (Tr. p. 12-13), is a showing that taxes were claimed and once being established constitute a first charge.

In further answer to the argument of respondent, we might say that the rules of court prescribe a clear and certain method by which to supplement the transcript, if the respondent feels it is insuf-

ficient or incomplete. It is apparent that the claim for taxes was presented because it appears in the record. It is further apparent that it was acted upon and disallowed because payment has never been made, and the payment of the receiver's claim will practically exhaust the fund.

Respondent takes exception to our failure to include the bills and statements for the taxes leaving the inference with the court that the taxes claimed are taxes on other property. This is not borne out by the record; in fact, the contrary appears, this being claim filed against the property of the bankrupt, Wishkah Logging Company. It is needless to answer the statement that a claim for \$499 as taxes could not exist against an estate which in bankruptcy realized but \$300.

In the argument upon the merits appearing on pages 4, 5 and 6 of respondent's brief, respondent has volunteered certain statements concerning the proceedings in bankruptcy court, which do not appear in the transcript, and are in no wise before this court. And it is apparent that if there were any basis for such statements, respondent would have filed a supplemental transcript. While any statement we may make regarding these statements or allegations made by respondent concerning the case will undoubtedly be de hors the record and unnecessary, yet we wish to make the following statement for what it may be worth:

The taxes claimed were assessed against property belonging to and owned by the bankrupt,

Wishkah Logging Company, at and prior to its adjudication, and that the property against which the taxes were so assessed did not pass to the mortgagee long prior to bankruptcy, but passed to the mortgagee after the Trustee was appointed, and as a result of a relinquishment after foreclosure in the Superior Court of Grays Harbor County.

Chehalis County has always urged its claim for taxes, and that it never filed a certificate nor did the county treasurer ever file a certificate showing that all the taxes or any taxes upon property which actually came into the hands of the Trustee had been paid. As a matter of fact, all these taxes were assessed against property which came into the hands of the Trustee and none of said taxes have ever been paid.

For the reasons above set forth, we feel that there is no merit in the motion made by respondent, and we further feel that the position taken by us in our opening brief is correct, and that the court below is in error.

Respectfully submitted,

G. R. SNIDER,  
T. B. BRUENER,

Attorneys for Petitioner.6





